Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, HERBERT STETTIN, P.A., and BANK OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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19PP

QUESTIONS PRESENTED

Does a bankruptcy court have subject matter jurisdiction concerning postconfirmation claims?

What are the fiduciary duties of a trustee appointed to liquidate the property of a debtor's estate transferred to a separate and distinct new liquidating trust created under the provisions of a confirmed plan in accordance with 11 U.S.C. § 1123(a)(5)(B), see *Holywell Corp. v. Smith*, 503 U.S. 47, 55 (1992)?

Is a bankruptcy court's dismissal, in violation of Fed.R.Civ.P. 41(a)(2), of a defendant's pending postconfirmation counterclaims, cross-claims, and third-party claims alleging damage to a liquidating trust created under the provisions of a confirmed plan, attributable to breach of trust, fraud, and conspiracy, an abuse of discretion?

Does a bankruptcy court have authority to limit a defendant's fundamental right of self-representation in a civil proceeding commenced to resolve postconfirmation claims?

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PETITION FOR A WRIT OF CERTIORARI

Theodore B. Gould, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. 1) is unreported. The district court's opinion (App. 14) is unreported. The bankruptcy court's order, granting a Fed.R.Civ.P. 41(a)(2) motion to dismiss the defendant's pending counterclaims, third-party claims, and cross-claims (App. 19) is unreported. The bankruptcy court's order, entered on May 31, 1996, denying that the adversary proceedings were core matters concerning the restructuring of debtor-creditor relations (App. 24) is unreported. The bankruptcy court's order denying the defendant's Fed.R.Civ.P. 56 motion for summary judgment (App. 21) is unreported. The bankruptcy court's order, entered on April 28, 1986, directing closing of the case (App. 30), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2000 (App. 1). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the U.S. Constitution involved in this petition for a writ of certiorari are appended herein at App. 32.

STATUTORY PROVISIONS INVOLVED

The statutes involved in this petition for a writ of certioari are appended herein commencing at App. 33.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Federal Rules of Civil Procedure involved in this petition for a writ of certiorari are appended herein at App. 40.

STATEMENT

Introduction

The principal question presented in this case concerns the administration of the bankruptcy laws related to proceedings after confirmation of a plan and a district court's authority to refer to a bankruptcy judge, in accordance with 28 U.S.C. § 157, App. 34, subject matter jurisdiction to enter a final judgment as a core matter, subject only to appellate review, concerning postconfirmation claims in causes alleging breach of contract, fraud, conspiracy, and breach of fiduciary duty.

This case also presents a federal question concerning the administration of a liquidating trust created after confirmation under the provisions of a plan of reorganization, in accordance with 11 U.S.C. § 1123(a)(5)(B), see ***Holywell Corporation v. Smith***, 503 U.S. 47, 55 (1992), and the fiduciary duties of a trustee to the liquidating trust's beneficiary to act with undivided loyalty, to use reasonable skill and care to preserve the trust property, avoid engaging in unlawful conduct, enforce claims against a third-party, and to dispose of trust property, within a reasonable time, that is no longer a proper investment. Specifically, this case concerns the question of whether it is a breach of trust for a fiduciary, appointed under the provisions of a plan proposed by a third person

with adverse interests to the trust's beneficiary, to incur liabilities and cause substantial damage to the trust property, that unjustly enrich the plan's proponent, in reliance on the settlor's indemnity holding the trustee harmless for his actions.

The Adversary Proceeding

This proceeding arises from an amended adversary complaint, filed on January 19, 1996,[1] in the United States Bankruptcy Court for the Southern District of Florida, allegedly for declaratory relief, by Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust ("plaintiff"),[2] against the defendant Bank of New York ("Bank"),[3] Miami Center Joint Venture

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[1] On August 8, 1985, the United States Bankruptcy Court for the Southern District of Florida confirmed a liquidating plan of reorganization, filed by the Bank of New York, on behalf of the petitioner. See ***In re Holywell Corp.***, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985), *appeal dismissed* as moot, ***Miami Center Limited Partnership v. Bank of New York***, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). See 10 *infra* (the trustee's conduct).

[2] This Court's prior opinion explained that the new Miami Center Liquidating Trust fit the description of a separate and distinct liquidating trust, and all of the legal title to the property of the petitioner's estate was transferred to Smith as "the fiduciary of the trust of an individual." 503 U.S. at 54.

[3] The Bank was the construction lender for the development of the Miami Center's first phase with a secured claim against the estates of the debtors Miami Center Limited Partnership ("MCLP") and Chopin Associates ("Chopin") that was "undersecured," 54 B.R. at 42, because, *inter alia*, the Bank's mortgages were subordinate to the Miami Center Joint Venture's claims and interests, see 8 n. 13 *infra*. In reliance on the Bank's indemnity, the trustee allowed the Bank to take $27,050,115 in postpetition interest as a credit against the Miami Center's purchase price under the provisions of the Bank's plan.

("MCJV"),[4] Olympia & York Florida Equity Corp. ("O&Y"),[5] and the petitioner.[6]

The trustee's complaint sought the bankruptcy court's declaratory judgment of (a) the amount and validity of the Miami Center Liquidating Trust's postconfirmation liability to MCJV[7] and (b) "the priority as between the claims" of O&Y and the Bank to the Miami Center Liquidating Trust's partnership interest in MCJV. The

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[4] MCJV was a general partnership formed under the laws of the State of Florida on March 2, 1981, of which the only general partners were O&Y and the petitioner. See ***In re Holywell Corp.***, 913 F.2d 873, 881 (11th Cir. 1990) ["Upon Gould's filing of the petition, his interest in MCJV became part of the bankrutpcy estate."] Under the Joint Venture Agreement, the trustee was bound by its terms, Section 7.5, and exclusive jurisdiction to resolve disputes between the partners was to be determined by arbitration in New York, Section 10.3.

[5] O&Y was a subsidiary of O&Y Equity Corp. (U.S.A.), the guarantor of O&Y's obligations under MCJV's Joint Venture Agreement. O&Y defaulted under the Joint Venture Agreement's terms, under which O&Y was required to obtain third-party institutional interim financing in an amount not exceeding $122,000,000 for the development of the Miami Center's second phase.

[6] As a fiduciary, the trustee stepped into the petitioner's shoes under the Joint Venture Agreement and the transfer of the petitioner's estate to Smith as trustee included the right to purchase O&Y's interest in MCJV for $10,000 upon repayment of $46,000,000 in MCJV's debt. See ***Olympia & York Florida Equity Corp. v. Gould***, 776 F.2d 42, 45 (2d Cir. 1985).

[7] Under MCJV's Joint Venture Agreement, the general partners were jointly and severally liable for MCJV's debts, Art. 2(e), and pursuant to the law of the case, see 913 F.2d at 877, the trustee was required, in accordance with the district court's order, entered on March 24, 1987, to pay MCJV's claims, "first, from the liquidating trust's remaining available cash; second, from any property controlled by the trustee, including Gould's interest in MCJV; and third, from the Bank's surety bond."

complaint also alleged breach of contract,[8] conspiracy to commit fraud and misrepresentation,[9] fraud and misrepresentation, and breach of fiduciary duty against O&Y and the petitioner.

On May 31, 1996, the bankruptcy court held that the defendants O&Y and the petitioner had a Seventh Amendment right to a jury trial, App. 24, and concluded:

> This court finds that the [plaintiff's] Claims do not "arise as part of the process or allowance and disallowance of claims," *Granfinanciera*, 492 U.S. at 58, 109 S.Ct. at 2799. Nor are "the claims integral to the restructuring of debtor-creditor relations." App. 28.

Although the bankruptcy court lacked subject matter jurisdiction to issue a judgment on the merits, the district court referred adversary proceedings commenced in the bankruptcy court to a bankruptcy judge to resolve preliminary motions. The bankruptcy judge orally held, citing ***In re Louisiana World Exposition***, 832 F.2d 1391, 1397 (5th Cir. 1987), that cross-claims against the Bank for

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[8] The alleged breach of contract concerned a post-confirmation agreement, entered into on June 26, 1986, which provided that *"no distribution of proceeds of the MCJV* (emphasis added) will be made available to Gould without reasonable advance notice thereof to said Liquidating Trustee, and with leave of the Bankruptcy Court."

The agreement also provided that the "disposition and accessibility, by way of sale or development, or alternatively, through liquidation, purchase or financing of Gould's interest in MCJV shall occur *no later than June 26, 1988.*" (emphasis added)

[9] The complaint alleged that O&Y paid $2,400,000 "in the guise of 'loans' . . . in order to fund Gould's litigation against the Trust." The trustee's reference is to the prior proceedings before this Court, concerning his fiduciary duty to pay the Miami Center Liquidating Trust's income taxes. See 503 U.S. at 57; also, 26 U.S.C. § 641(b). (The fiduciary shall pay the taxes.)

reimbursement of the Miami Center Liquidating Trust's administrative expenses under its indemnity were "colorable"[10] and the trustee "refused unjustifiably to pursue the claim." Thus, the bankruptcy judge concluded:

> COURT: The order that we have come up with is ***Fred Stanton Smith v. Bank of New York***, 161 B.R. 302 and quoting from that, from Page 306, "A plain reading of the unambiguous wording leads inevitably to the conclusion that the bank agreed to indemnify the trustee for any consequence of his implementation of the plan of reorganization, including, but not limited to the tax consequences." . . . Gould's assertion would be included within that would be the costs of administration. Mr. Gould, I just want to make sure I understand your argument.
>
> GOULD: That's correct.
>
> COURT: And he's asserting that the estate should pursue that claim and you've not done so. . . . (Citation omitted) [T]he claim must be colorable . . . the trustee must have refused unjustifiably to pursue the claim and the party

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[10] The bankruptcy judge held:

> The issue before me is whether you [Gould] should bring the cause of action. As I understand it, ***they are saying yes, you can bring it . . . in the adversary.*** (Emphasis added) Then you get to the issues, number one, the amount of the indemnification claim . . . and secondly, whether the bank has a right of setoff, which means you get to the insolvency issue.

Bkrtcy. S.D. Fla., ***Transcript***, September 12, 1996, at 23. The "insolvency issue" refers to the application of 26 U.S.C. § 108 concerning $57,638,444 in cancellation of debt income attributable to MCJV's termination on October 29, 1997. See 14 *infra*, Wilder's testimony, based on the bankruptcy court's exercise of postconfirmation jurisdiction over the Miami Center Liquidating Trust.

> in this case . . . obtain[s] leave from the Court . . . to pursue the claims against the bank.

Bkrtcy. S.D. Fla., ***Transcript***, September 12, 1996.

On October 7, 1996, the trustee filed a Second Amended Complaint after the commencement of Chapter 11 proceedings for MCJV and O&Y in the United States Bankruptcy Court for the Southern District of New York without modifying the allegations previously made.

In answer, the petitioner filed counterclaims against Smith, alleging breach of fiduciary duty and fraudulent misrepresentation for, *inter alia*, (1) failure to pay MCJV's claims in accordance with the plan's provisions,[11] (2) failure to seek reimbursement of the Miami Center Liquidating Trust's administrative expenses as "colorable" claims under the Bank's indemnity, 6 *supra*, (3) failure to dispose of the Miami Center Liquidating Trust's investment in MCJV no later than June 30, 1988, see 5 n. 8 *supra*, (4) failure to comply with the bankruptcy court's order closing the case, App. 30, and (5) falsely representing that a reserve for all disputed claims had been

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[11] Article IV, ***Means For Execution Of The Plan***, provided, in part:

> The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date. (ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date. (iii) ***take all steps and to*** make ***all payments, from such cash (and, if necessary, from the Washington proceeds)*** (emphasis added) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

established in a Disputed Claims Fund, Art. VII, ***Disputed Claims.***[12] See ***Miami Center Limited Partnership v. Bank of New York***, 820 F.2d 376, 379 (11th Cir. 1987) [Appeal of the bankruptcy court's order confirming the Bank's amended plan is moot, because "the trustee has paid or reserved funds to pay all creditors other than debtor-affiliated creditors, [thus] this Court cannot provide effective relief."]

The cross-claims alleged that the Bank was liable for equitable indemnification and the failure to disclose material facts that (1) in consideration of MCJV leasing certain furniture, fixtures and equipment ("FF&E") to MCLP, the Bank had filed UCC-1 forms ***subordinating*** its mortgages, in whole or in part, to MCJV's right under the leases[13] and agreed to "***continue the leases in full force***

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[12] Article VII provides, in part:

> As soon as is practicable after the Miami Center Closing Date, and payment of the Class 1, 2, 3 and 4 Claims out of Trust Property, the Trustee shall establish the Disputed Claim Fund, in an initial amount reasonably necessary to pay the Debtors' anticipated liability on Disputed Claims.

[13] In the Bank's prior appeal of the bankruptcy court's decision, quieting MCJV's title to part of the FF&E leased to MCLP, see ***In re Holywell Corp.***, 51 B.R. 56 (Bkrtcy S.D. Fla. 1985), the district court found:

> ***The Bank gave its approval of the protective provisions of the Leases that would assure MCJV's priority rights as owner***. . . . (Emphasis added)
>
> The Bank filed the UCC-1 forms reflecting and recording priority rights of MCJV as owner. ***Such rights were superior to those of the Bank as well as to general and unsecured creditors.*** (Emphasis added)

In re Holywell Corp. (Bank of New York v. Gould, O&Y, and MCJV), (unreported) No. 85-3430 (S.D. Fla., June 23, 1986), *affirmed*, No. 86-5609 (11th Cir., October 12, 1988).

and effect in the event of MCLP's default"; (2) the Bank's plan wrongfully subordinated MCJV's claim against the debtor MCLP's estate for unpaid rent, 913 F.2d at 880, to the Bank's mortgages, and the fair market value of MCJV's personal property to real estate taxes assessed against the estate of the debtor Chopin's property, see 7 n. 11 *supra*, causing accrued postconfirmation interest of *$15,269,243*, as of April 5, 1994, incurred under the Trustee's Certificate that the bankruptcy court authorized in accordance with the Second Amendment of the Bank's plan for reimbursement of the Bank's payment of MCJV's claims against MCLP's estate; (3) the Bank conspired with the trustee to fraudulently impose the Miami Center Liquidating Trust's income taxes on the petitioner,[14] see 503 U.S. at 56; (4) caused the Miami Center Liquidating Trust to incur postconfirmation administrative expenses *of $7,225,682.86*; and (5) cancellation of debt income, in the amount of *$57,638,444*, attributable to MCJV's termination for the taxable year ended December 31, 1997.

The testimony of Smith, the trustee's attorneys[15] and accountants,[16] during discovery in this case and the

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[14] "[W]here conspiracy is charged, the allegation as a rule only means that two or more persons were so far co-operating in their acts that the acts of any one was the act of all," Holmes, *The Common Law*, at 143.

[15] Herbert Stettin ("Stettin") was joined as a defendant in the petitioner's counterclaim of breach of fiduciary duty against Smith on December 26, 1996. Stettin was appointed as the trustee's attorney on May 27, 1987, and has testified as follows:

> GOULD: Did you fail to advise Smith to pay MCJV's claims because the Bank was appealing the question of whether the leases were unperfected financing agreements?
>
> STETTIN: The Bank wished to appeal further the decision of the district court [see 8 n. 13 *supra*]. ***The position I took was pretty obviously that these***

related proceedings concerning repayment of certain "super-priority" loans, was:

> STETTIN: ***The trustee commenced substantial consummation of the plan deliberately as soon as the plan became effective. Mr. Wolff***[17] ***has testified that the reason they did that was . . . in an attempt as best they could moot any appeals that were being taken. The Bank wanted the plan to be substantially consummated as soon as possible and Mr. Wolff agreed with that theory***. (Emphasis added)
>
> GOULD: ***Did Mr. Wolff and . . . Mr. Smith testify that they relied upon the Bank's indemnity in proceeding with signing the contract of***

> ***[leases] were failed security agreements and not true leases.*** (Emphasis added)

Compare 54 B.R. at 42 [The bankruptcy court "rejected the bank's contention."] Also 30 *infra*, quoting *Restatement (3d) Trusts*, § 209 [A trustee has a duty of undivided loyalty to the beneficiary . . .] Stettin was paid *$1,639,385.32* from the petitioner's estate and the Bank paid a bonus of *$50,000* to Stettin.

[16] Arthur Andersen, LLP, was appointed as the trustee's accountant on September 19, 1985. Andersen's representatives were Donald A. Denkhaus, Allen Fisher, and Gregory F. Wilder. Andersen was paid *$1,363,993* from the petitioner's estate and the Bank paid *$100,000* to Andersen for tax work.

[17] Irving M. Wolff, formerly of Holland & Knight, was appointed on September 19, 1985, as the trustee's first attorney. Mr. Wolff was dismissed in an *ex parte* conference during which the original presiding bankruptcy judge made the following statement:

> Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan which this Court confirmed is defective.

Bkrtcy. S.D. Fla., ***Transcript***, May 15, 1987, at 3.

> ***sale and also the distribution for the purposes of mooting the*** [appeal of the bankruptcy court's Confirmation Order]? (Emphasis added)
>
> STETTIN: ***They relied upon the Bank's indemnification for all of their conduct in consummating the plan.*** (Emphasis added)

Bkrtcy. S.D. Fla., Deposition of Herbert Stettin, February 27, 1998, at 113.

> GOULD: Under the provisions of the Bank's amended plan, were you required to pay the principal amount of undisputed claims within 45 days after the plan's effective date?
>
> SMITH: Yes.
>
> GOULD: Did you?
>
> SMITH: No.

Bkrtcy., S.D. Fla., ***Transcript***, June 29, 1998, at 147.

. . .

> GOULD: Was adequate funds transferred to you on October 11, 1985[18] to pay the principal amount of all claims, including MCJV's Claim 502 for unpaid rent?
>
> SMITH: Yes.
>
> GOULD: Do you dispute his [Stettin's] testimony that the reason that [MCJV's] Claim 502 was not paid was because you believed it was necessary to reserve for the payment of taxes?
>
> STETTIN: [A]re you referring . . . to the order that we obtained from Judge Weaver that the trust did not have sufficient funds to pay [MCJV's Claim 502]?
>
> GOULD: Are we all in agreement that everybody has conceded, including the bank, that the

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[18] As of October 10, 1985, the trustee had $38,273,052.66 in cash and U.S. Treasury bills.

questions concerning your responsibilities for the payment of taxes was the basis for Judge Weaver concluding that there weren't sufficient funds?

SMITH: Yes.

STETTIN: The answer is yes. We didn't have enough money, if we had to pay Claim 502.

COURT: [A]nd do you agree with Mr. Stettin's testimony that the bank has been held liable under its indemnity for any consequences concerning your actions under the provisions of the bank's plan or the execution of the contract of sale?

SMITH: Yes.

COURT: Including the failure to pay MCJV's claim?

SMITH: Yes.

GOULD: Did you enter into an agreement with the Bank on the Miami Center's closing which required the Bank to agree to closing adjustments within 45 days?

SMITH: Yes.

GOULD: Did the Bank?

SMITH: No.

GOULD: Did you also enter into an agreement with the Bank requiring them to provide you with an accounting to adjust the credit that they were given against the Miami Center's purchase price?

SMITH: Yes.

GOULD: Did the Bank give you an accounting?

SMITH: No.[19]

Bkrtcy. S.D. Fla., ***Transcript***, June 29, 1998, at 150-152.

GOULD: [Has] Andersen commingled . . . the postconfirmation expenses of the Miami Center Liquidating Trust with preconfirmation claim[s] of creditors against the various bankruptcy estates?

DENKHAUS: The cash receipts and analysis includes payments from the trust fund which does include pre and post-petition claims.

. . .

GOULD: Did Andersen advise Mr. Smith *prior* (emphasis added) to his commencement of distribution under the provisions of the Bank's plan before October 12, 1987 that if the Washington proceeds were transferred to the trustee that a reserve should be established for the payment of income taxes?

DENKHAUS: No.

Bkrtcy., S.D. Fla., ***Transcript***, June 29, 1998, at 28.

GOULD: Does Section 6001 of the Internal Revenue Code specifically require that the person who prepares the books maintain separate financial records for separate taxable entities?

WILDER: . . . [I]n general that's the correct answer.

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[19] Holland & Knight, the trustee's first attorney, estimated that the Bank unilaterally determined the accrued interest, in an amount of *$13,130,086*, in excess of the amount due under the loan documents. See Story, *Equity Proceedings*, Ch. xiv, §§ 796, 797, and 798 (The conveyance of property to a lender "stands as security only for what is justly due.") Compare ***In re Holywell Corp.***, 901 F.2d 931, 934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991) ("The amount of interest . . . was included in the Bank's bargain for the purchase of the property.")

GOULD: You've testified that Andersen is in receipt of a draft final tax return for the Miami Center Joint Venture and a K-1 for the Miami Center Liquidating Trust reporting in excess of $57 million in cancellation of debt income, is that right . . . [What] would your conclusion be . . . concerning the trustee's responsibility of reporting $57 million in cancellation of debt income?

WILDER: Our conclusion would be that the [$]57 million would be realized income, but the income would not have to be recognized for tax purposes because the conclusion is that the Miami Center Liquidating Trust, ***while it is still subject to bankruptcy court jurisdiction*** (emphasis added), would be able to entitle itself to the exclusion under Section 108 for cancellation of indebtedness income. So in other words the [$]57 million would not be taxable to MCLT.

GOULD: [I]t would not have to be reported at the partnership level under Section 108(a) of the Internal Revenue Code, is that it?

WILDER: It ***would not have to be reported as taxable income. . . . The second reason is that the exclusion under Section 108 also applies to a taxpayer that is insolvent***. (Emphasis added)

Compare 161 B.R. at 306 (The Bank's liability under its indemnity.)

GOULD: ***What is the basis for treating the Bank of New York as a beneficiary of the Miami Center Liquidating Trust?*** (Emphasis added)

> WILDER: . . . [T]*he prevailing case law indicates that [the] creditor is the beneficiary in this case.* (Emphasis added)[20]
> GOULD: Is that what Section 661 of the Internal Revenue Code provides?
> WILDER: No.
> GOULD: Is the Miami Center Liquidating Trust referred to as [a] creditor's trust in any documentation?
> WILDER: No.
> GOULD: [W]hy [have] you concluded that the Miami Center Liquidating Trust is a creditor's trust in view of this decision, which is referred to as *Holywell Corp. v. Smith,* [503 U.S. 47 (1992)]?
> WILDER: *We were informed by Mr. Stettin . . . there would be nothing left over other than for creditors.* . . .

Bkrtcy. S.D. Fla., *Transcript,* June 29, 1998 at 83-85.

On June 5, 1998, Smith and the defendant Bank filed a joint motion to dismiss *without* prejudice the plaintiff's allegations against the petitioner of fraud, breach of contract, and conspiracy, and to dismiss the petitioner's pending counterclaims, cross-claims, and third-party claims *with* prejudice.

On July 30, 1998, after filing motions to join Andersen and Holland & Knight as indispensable parties needed for just adjudication of the damages caused by the trustee's breach of trust, the petitioner filed a motion in accordance with Fed.R.Civ.P. 15(b) to amend and supplement the pleadings previously filed, and asked for a

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[20] Compare *Restatement (2nd) Trusts,* § 12, ***Trust and Debt,*** Comment a: *Nature of interest of beneficiary and creditor* ("The beneficiary of a trust has the beneficial interest in the trust property. A creditor as such has merely a personal claim against the debtor. . . . ")

trustee's accounting to conform to the evidence and to set forth the trustee's transactions or occurrences with respect to the tax consequences of MCJV's termination.

On August 4, 1998, the bankruptcy judge denied the petitioner's Fed.R.Civ.P. 56 motion for summary judgment (App. 21), despite the fact that after discovery was completed, the Bank's attorney filed a joint memorandum with the trustee, admitting that the plaintiff's allegations, and evidence, are "unverified pleadings." Thereafter, the bankruptcy judge granted the joint motion to dismiss, 15 *supra*, and directed Stettin to draft the bankruptcy court's order with the following instructions:

> As to the Motion to Dismiss 95-0481 . . . Judge Weaver on May 1st, 1990 entered an order requiring Mr. Gould to obtain local counsel before he files any pleading with this court. ***95-0481 was filed without counsel in violation of Judge Weaver's order. I hereby grant the Motion to Dismiss on that basis.*** (Emphasis added)
>
> This Court entered an order on December 9th, 1997 . . . . That order bars any claims not asserted within the time frame specified (90 days). ***Adversary 95-0481 was pending at that time and obviously those claims were not barred by the passage of any time, but any other claims not asserted are barred by virtue of this Court's order.*** (Emphasis added)

Bkrtcy. S.D. Fla., ***Transcript***, August 13, 1998, at 57.

The District Court's Affirmance

The district court's opinion held:

> Gould is correct to argue that an action may not be dismissed against the defendant's objection unless the counterclaim can remain pending. See Fed.R.Civ.P. 41(a). Gould, however, is incorrect

> when he suggests that the dismissal of the Trustee's claims somehow terminated his counterclaims and cross-claims. ***Gould's counterclaims and cross-claims did remain pending. but the Bankruptcy Court dismissed them.*** (Emphasis added) App. 16.

Nevertheless, the court affirmed the bankruptcy court's dismissal of the pending counterclaims, cross-claims, and third-party claims:

> Gould argues that the statute of limitations has not run, but even if it did, the Bankruptcy Court's reliance on Florida's statute of limitatons to dismiss his "counterclaims, cross-claims and third-party claims is contrary to the equity rules of jurisprudence. This thin argument is not persuasive. App. 16.

The district court also held, citing ***United States v. Dougherty***, 473 F.2d 1113, 1124 (D.C. Cir. 1972), that

> [t]he right of self-representation is not limitless and may be curtailed if, as the Bankruptcy Court long ago concluded about Gould, a *pro se* litigant has abused the right. App. 15, n. 1.

The Opinion Of The Court Of Appeals

The court of appeals affirmed in a 15-page unpublished opinion which held that "[i]n the bankruptcy case as a whole, the records show that Gould has shown a pattern of willful contempt of the bankruptcy court's orders," App. 9, and quoting the bankruptcy court's final decree, which Stettin drafted, found that the "litigation in this case has been unending[21] and most of it

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[21] See App. 30 (The bankruptcy court's order directing the trustee to file a final report for a final decree closing the case was entered on April 28, 1986, with which the trustee failed to

frivolous,"[22] App. 10. The court also held:

> Gould's argument that he has an unqualified right to represent himself is without merit. This Court, in ***Procup v. Strickland***, 792 F.2d 1069 (11th Cir. 1986), recognized limitations on the right to represent one-self. ***The test is whether the restriction imposed by the court serves as an absolute bar to filing any suit in a federal court.*** ***Id.*** at 1071. (Emphasis added) In ***Procup***, the district court barred a federal prisoner serving a life sentence from filing any case without an attorney filing it for him. This Court found that this restriction would foreclose him from filing any suits at all. ***Id.***
>
> This case is distinguishable from ***Procup*** on several grounds. ***First, this is a bankruptcy case involving a sophisticated businessman and not a prisoner.***[23] (Emphasis added) ***Second, this***

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comply, *inter alia*, to use the bankruptcy court to protect himself from personal liability under 31 U.S.C. § 3713(b) for the failure to timely pay income taxes as a fiduciary.) See 26 U.S.C. § 7421(b)(2).

[22] See ***Miami Center***, 838 F.2d at 1557 (The trustee dismissed a fraud action against the Bank in accordance with the confirmed plan's provisions.) Compare ***United States v. The Libellants and Claimants of The Schooner Amistad***, 40 U.S. 518, 594 (1841) ["Fraud will vitiate any, even the most solemn transactions:]; ***United States v. Throckmorton***, 98 U.S. 61, 68 (1878) (The general maxim that fraud vitiates every proceeding has "relation to frauds, extrinsic or collateral to the matter tried by the first court.") Also, 913 F.2d at 880 ("if the classification scheme violates basic priority rights, the plan cannot be confirmed"); 161 B.R. at 307 ("The law requires an analysis of the tax consequences and provision for payment, 11 U.S.C. § 1129(d)."") [A scheme to avoid taxes cannot be confirmed]).

[23] Compare ***Price v. Johnston***, 334 U.S. 266, 285 (1947) ["Lawful incarceration limits 'the otherwise unqualified

> ***restriction is limited to proceedings in the overall bankruptcy case*** and does not foreclose the federal courts to Gould as a whole. (Emphasis added) ***Third, and, most significantly, this Court has already upheld the contempt order in question.***[24] (Emphasis added) App. 10.

The court of appeals also held, quoting 28 U.S.C. § 157(b), and Federal Rule of Bankruptcy Procedure 3020(d), that the bankruptcy court had subject matter jurisdiction to resolve

> this adversary proceeding [which] involves ***a core proceeding because it involves a matter regarding allowance and estimation of claims involving the trust.***[25] (Emphasis added) App. 13.

REASONS FOR GRANTING THE WRIT

1. *The Fundamental Right Of Self-Representation In A Civil Action Is Unlimited And Unqualified.*

The court of appeals' decision represents a conflict among the various circuit courts of appeals, and the plain language of 28 U.S.C. § 1654, App. 33, which requires concluding that "[t]he right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms," ***Adams v. United States***, 317 U.S. 269, 270 (1942). ***O'Reilly v. New York Times Co.***, 692 F.2d 863, 867 (2d Cir. 1982), quoting ***Faretta v. California***, 422 U.S. 806, 812 (1975), held that "the right of self-representation has been protected by statute"; ***Andrews v. Bechtel Power Co.***, 780 F.2d 124, 137 (1985), citing ***O'Reilly***, held

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right . . . to parties in all the courts of the United States to plead and manage their own causes personally'."]

[24] See 20 n. 26 *infra*.

[25] Compare 503 U.S. at 58-59 (11 U.S.C. § 1141(a) is *not* binding with respect to postconfirmation claims.)

that "there is a statutory right of long-standing to . . . self-representation"; ***United States v. Odom***, 423 F.2d 875, 877 (9th Cir. 1970), held that the right of self-representation is unlimited; ***United States v. Dougherty***, 473 F.2d 1113, 1123 (D.C. Cir. 1972) held that "the right of self-representation . . . was recognized by Congress as a fundamental right." ***United States ex rel. Maldonado v. Denno***, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 348 U.S. 1007 (1966), held that the right of self-representation is "unqualified" in civil actions.

In this case, the court of appeals has held, in reliance on its affirmance of the bankruptcy court's clearly erroneous and manifestly unjust civil contempt order, ***In re Holywell Corp.***, 967 F.2d 568 (11th Cir. 1992),[26] that a prisoner's right of self-representation is unqualified, but the bankruptcy court had authority to require the petitioner to incur the expense of engaging counsel after confirming the Bank's plan, under which all of the property of the petitioner's estate was transferred to a trustee,

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[26] After this Court's ***Holywell*** opinion was issued, the court of appeals affirmed the bankruptcy court's contempt order based on the trustee's motion, which argued:

> . . . ***the explicit ruling of the bankruptcy court denying his*** [petitioner's] ***motion to establish reserves for the payment of the same taxes*** (emphasis added). . . . It [petitioner's motion] will also violate the effect of the dismissal of his lawsuit against the Liquidating Trustee personally in which Mr. Gould sought damages for, *inter alia*, the failure to pay the alleged taxes. ***In re Holywell Corp.***, 93 B.R. 780 (S.D. Fla. 1988), *aff'd* 88 [sic] F.2d 1086 (11th Cir. 1989), *cert. denied*, ___ U.S. ___.

Compare 503 U.S. at 52 ["the trustee must pay the tax on the income attributable to the . . . property because § 6012(b)(3) requires him to make a return as the 'assignee' of the 'property . . . of a corporation'."]

503 U.S. at 55, for the purpose, *inter alia*, of depriving the petitioner of funds to engage counsel to defend against the trustee's conspiracy with the Bank to impose the Miami Center Liquidating Trust's income taxes on the petitioner. ***Id.*** at 56.

28 U.S.C. § 1654 does not provide that "[i]n all courts of the United States the parties may plead and conduct their cases personally," *except* that in the administration of the bankruptcy laws, a court shall have the authority to require parties to engage counsel to file pleadings as a defendant in such court. The rules of a court for the management of a case, and a bankruptcy court's power to impose Rule 9011 sanctions, cannot be construed to deprive a party of a statutory right. See ***DeNardo v. Murphy***, 781 F.2d 1345, 1348 (9th Cir. 1986), *cert. denied*, 476 U.S. 1111 (1966) ("[L]itigiousness alone is no reason to enjoin future litigation"); also ***Green v. Warden***, 699 F.2d 364, 370 (7th Cir. 1983), *cert. denied*, 461 U.S. 960 (1983) ("a person's access to the courts [must] be 'adequate, effective, and meaningful'.") Compare ***Farguson v. M Bank Houston, N.A.***, 808 F.2d 358, 360 (5th Cir. 1986)

2. *A Bankruptcy Court's Postconfirmation Subject Matter Jurisdiction And Equitable Power Is Limited To The Resolution Of Controversies Concerning Preconfirmation Claims As Core Matters*

A district court's authority to refer postconfirmation claims to a bankruptcy judge under 28 U.S.C. § 157(a), App. 34, is an important question concerning the administration of the bankruptcy laws, upon which this Court has not issued an opinion. The court of appeals' decision is a broad precedent that expands a non-Article III court's power, allowing a district court to treat postconfirmation claims that are "related to" a case under title 11 as core matters which can be referred to a bankruptcy judge to enter a final judgment, subject only to

appellate review. It also impermissibly extends a bankruptcy court's subject matter jurisdiction to issue declaratory judgments concerning the tax liabilities of third parties, breach of contract actions, tort, and indemnity actions.

In the prior proceedings concerning the trustee's duty to pay postconfirmation income taxes, this Court held:

> Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to postconfirmation claims. Cf. 11 U.S.C. § 101(10) (1988 ed., Supp. II) (defining "creditor" as used in § 1141(a) as an entity with various kinds of preconfirmation claims.) 503 U.S. at 58.

The necessary implication of this Court's opinion is that a bankruptcy court does not have subject matter jurisdiction to issue binding orders concerning postconfirmation claims as core matters. The bankruptcy judge properly held that "the Claims do not 'arise as part of the process of the allowance and disallowance of claims,' (citation omitted) [n]or are 'the claims integral to the restructuring of debtor-creditor relations'," 5 *supra*. Nevertheless, despite the fact that the Miami Center Liquidating Trust is *not* a bankruptcy estate, 503 U.S. at 55, and the trustee was not a "bankruptcy trustee," see 25 *infra*, the court of appeals erroneously concluded this case is a core matter, because it involves the allowance and estimation of claims against the Miami Center Liquidating Trust.

In ***Northern Pipeline Construction Co. v. Marathon Pipe Line Company***, 102 S.Ct. 2858 (1982), this Court held:

> In sum, Art. III bars Congress from establishing legislative [Art. I] courts to exercise jurisdiction

> over all matters related to those arising under the bankruptcy laws. 102 S.Ct. at 2874.

In *Marathon*, quoting *Crowell v. Benson*, 285 U.S. 22 (1932),[27] this Court held unconstitutional, as an encroachment on the judicial power reserved for Article III courts, the Bankruptcy Act of 1978's grant of jurisdiction to a bankruptcy court to issue a final judgment, subject only to appellate review, concerning Northern's prepetition lawsuit against Marathon, seeking damages for, *inter alia*, breach of contract and fraud, 102 S.Ct. at 2880. The plurality opinion was based on the conclusion that:

> [o]ur precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. *Id.* at 2879, n. 39.

Article III vests the judicial power to exercise equitable power, and separately to resolve cases arising under the common law, in judges appointed to hold office during good behavior, App. 32, and thus, this Court has also held that a bankruptcy court must find its equitable powers in the jurisdiction conferred by Congress, ***Bender v. Williamsport Area School District***, 475 U.S. 534, 541 (1986). A bankruptcy court's equitable powers "can only be exercised within the confines of the Bankruptcy Code," ***Norwest Bank Worthington v. Ahlers***, 108 S.Ct. 963, 968 (1988). "By its very terms, Section 105(a) limits the bankruptcy court's equitable powers, which "must and can only be exercised within the confines of the

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[27] ***Marathon***, 102 S.Ct. at 2877, concluded, quoting ***Crowell***, 285 U.S. at 64, that "the essential independence of judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine . . . an issue . . . upon its own record and the facts elicited before it."

Bankruptcy Code" . . . and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code (Citations omitted) ***F.D.I.C. v. Colonial Realty Co.***, 966 F.2d 57, 59 (2d Cir. 1992).

It is a fundamental rule of Anglo-American jurisprudence that where a lawsuit at common law and the resolution of equitable rights is involved, the cause of action shall be heard in a court of law and the party is entitled to a jury trial under the Seventh Amendment, App. 27. ***Granfinanciera S.A. v. Nordberg***, 109 S.Ct. 2782, 2783-2794 (1989). However, the decision of the court of appeals finds the bankruptcy court's subject matter jurisdiction to resolve postconfirmation claims, alleging breach of contract, fraud, and conspiracy, in the provision of the Bank's plan for the retention of jurisdiction of the Miami Center Liquidating Trust until the entry of a final decree pursuant to Bankruptcy Rule 3020(d), App. 12.[28]

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[28] Bankruptcy Rule 3022 specifies the procedure for the entry of a final decree closing a case, in accordance with 11 U.S.C. § 350, App. 39, and various courts have reviewed the Rule's application in reliance on the Advisory Committee's Note, which is:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested

As the original presiding bankruptcy judge held, the Bank's plan was substantially consummated under 11 U.S.C. § 1101(2) upon the termination of the petitioner's chapter 11 estate and the transfer of the estate's property to the new and separate Miami Center Liquidating Trust, App. 30.

Since a bankruptcy court exercises *in rem* jurisdiction of the estate created under 11 U.S.C. § 541(a), and the trustee was not the fiduciary of a bankruptcy estate, 503 U.S. at 56, the Bank's plan was "fully administered" when legal title was vested in the trustee, and the equitable interest revested in the petitioner on the plan's effective date of October 10, 1985. 503 U.S. at 56. Moreover, it is a dispositive and uncontroverted fact that the trustee was not appointed under 11 U.S.C. § 1104(a) and the Bank retained the discretion to "terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead." Art. V. ***Creation of Trust***, 11. Thus, the case should have been closed pursuant to 11 U.S.C. § 350, App. 39, no later than May 31, 1986, in accordance with the original presiding bankruptcy judge's order directing the trustee to file an application for a final decree closing the case, App. 30. See ***In re Brass Corp.***, 169 F.3d 957, 962 (5th Cir. 1999) (a plan is substantially

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matters, and adversary proceedings have been finally resolved.

The court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future. A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders and does not prevent the court from reopening the case for cause pursuant to § 350(b) of the Code. . . . ***Walnut Associates v. Saidel***, 164 B.R. 487, 493, n. 8 (E.D. Pa. 1994).

consummated when allowed administrative, priority, and general unsecured claims have been paid and substantially all property to be transferred under the plan has been transferred.)

Generally, the various courts of appeal have held that bankrupty courts have postconfirmation jurisdiction over disputes concerning the implementation of a confirmed plan which could adversely affect a debtor's "fresh start." The First Circuit Court of Appeals has held, quoting 11 U.S.C. § 105(c), that "[t]he powers of a bankruptcy court, as ennumerated in 28 U.S.C. § 157, are limited to the "authority . . . conferred upon the court under [the Bankruptcy Code," ***In re Corporacion de Services Medicos Hospitalarios de Fajardo***, 805 F.2d 440, 443 (1st Cir. 1986), and ***Goodman v. Philip R. Curtis Enterprises, Inc.***, 809 F.2d 228, 232 (4th Cir. 1987), has held that "[t]he bankruptcy court's authority following confirmation of a plan is defined in 11 U.S.C. § 1142. This grant of postconfirmation authority limits the authority of the court to matters concerning the implementation or execution of a confirmed plan."

In ***Zerand-Bernal Group, Inc. v. Cox***, 23 F.3d 159, 164 (7th Cir. 1994), the Seventh Circuit Court of Appeals held that notwithstanding a plan's provision for the retention of postconfirmation jurisdiction, a bankruptcy court "cannot write its own jurisdictional ticket" and concluded that a bankruptcy court lacked subject matter jurisdiction to adjudicate a postconfirmation adversary proceeding. See also ***Hospital & Univ. Property Damage Claimants v. Johns-Manville Corp.***, 7 F.3d 32, 34 (2nd Cir. 1993).

In ***Thomas v. Union Carbide Agric. Products Co.***, 473 U.S. 568, 584 (1985), this Court reaffirmed ***Marathon*** and held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and

issue binding orders in a traditional contract action arising under state law, without the consent of the litigants, and subject only to ordinary appellate review." See 28 U.S.C. § 157(c)(1), App. 35.

Although bankruptcy judges are judicial officers of the district court and their exercise of judicial power is subject to the district court's authority, the plain language of the statutory grant of jurisdiction to district courts under 28 U.S.C. § 1334(d), App. 34, is limited to "all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate," and the property of the estate consists of "all legal or equitable interests of the debtor in the property as of the commencement of the case," 11 U.S.C. § 541(a), App. 36. Thus, this Court has previously held concerning the Miami Center Liquidating Trust:

> Whether or not the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation, as the United States contends, we do not believe that a mere substitution occurred in this case. The plan, as quoted above, "declared and established" the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to respondent Smith as trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the trustee control of this property. 503 U.S. at 55.

The bankruptcy estate created under 11 U.S.C. § 541(a) was terminated as an effect of confirmation of the Bank's plan. ***In re Holywell Corp.***, 911 F.2d 1539, 1547 (11th Cir.

1990), citing ***United States v. Redmond***, 36 B.R. 932, 934 (D.C. Kan. 1984).[29]

This case is also different from a "liquidating plan" under which a bankruptcy court would have postconfirmation jurisdiction of the debtor's assets, which would be marshalled and liquidated for distribution to creditors, with no reorganized debtor surviving the bankruptcy, and no discharge of the debtor pursuant to 11 U.S.C. § 1141, App. 36. Here, the petitioner was discharged, see ***Miami Center***, 838 F.2d at 1552 ("the debtors' property passed to the liquidating trustee and the debtors were discharged under Code Section 1141"), and the trust's property was depleted by the accrued interest attributable to the trustee's failure to pay MCJV in accordance with the plan's provisons and the interest, fiduciary fees, attorneys' fees, and accounting expenses attributable to his reliance on the Bank's indemnity for the failure to discharge his lawful duties under the Internal Revenue Code. Wrongly, the trustee did not seek the court's instructions concerning questions of judgment with notice to creditors and interested parties, prior to the commencement of distribution under the plan's provisions, 10-11 *supra*. See ***Mosser v Darrow***, 341 U.S. 267, 274 (1951) ("The most effective sanction for good administration is personal liability.")

3. *The Dismissal Of Pending Counterclaims, Cross-Claims, And Third-Party Claims, Seeking Damages, In Violation Of Fed.R.Civ.P. 41(a)(2) Is An Abuse Of Discretion.*

The counterclaims, cross-claims, and third-party claims for damages find support in the fundamental rule of the common law in Anglo-American jurisprudence that

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[29] This Court's ***Holywell*** opinion reversed the court of appeals' decision for other reasons.

"[i]n all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." The *Common Law*, Oliver Wendell Holmes, Jr., quoting Sir Thomas Raymond's opinion in ***Bessey v. Olliot***, 467 A.D. 1682.

The testimony of witnesses, documentary evidence, and the record of the proceedings require concluding that the Bank's wrongful subordination of MCJV's claims, 913 F.2d at 880, and Smith's failure to discharge duties concerning the payment of income taxes imposed by law and to act with undivided loyalty as a fiduciary, in reliance on the Bank's indemnity, 161 B.R. at 306, has damaged the petitioner, 6 *supra*. Nevertheless, the court of appeals concluded that the bankruptcy court "did not abuse its discretion in dismissing Gould's crossclaims, counterclaims, and third-party claims," App. 13, and, thus, "Gould's arguments regarding the denial of his motions are moot," ***Id.***

This Court's "cases hold that '[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction'," ***Firestone Tire & Rubber Co. v. Risjord***, 449 U.S. 368, 379-80 (1981), and it is uncontroverted in this proceeding that "Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court," ***Motorcity of Jacksonville v. Southeast Bank, N.A.***, 120 F.3d 1140, 1143 (11th Cir. 1997). Thus, the court of appeals was bound by this Court's ***Holywell*** opinion that a bankruptcy court lacks subject matter jurisdiction to issue binding orders under 11 U.S.C. § 1141(a) concerning postconfirmation claims, 503 U.S. at 58.

It is also uncontroverted, as the district court held, that "an action may not be dismissed against the defendant's objection unless the counterclaim can remain pending," 16 *supra*, see Fed.R.Civ.P. 41(a)(2), App. 41, and that the bankruptcy court did not dismiss the counterclaims, cross-claims and third-party claims based on the

merits of this case, or Florida's general statute of limitations. See 16 *supra*. Thus, the administration of the appellate process requires a determination of whether it is an abuse of discretion for a court that lacks jurisdiction to issue a final judgment on the merits to dismiss a case concerning the trustee's failure to sell trust property that the trustee had a duty to sell. In such a case, the beneficiary may charge the trustee with the amount of proceeds that would have been received had the trustee properly sold the property. See *Restatement (3d)* ***Trusts***, § 209. It is also settled that "[t]he trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of a third person," *Restatement (2d)* ***Trusts***, § 170, Comment g. Furthermore, "[t]he trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust," *Restatement (2d)* ***Trusts***, § 177. In this case, the Miami Center Liquidating Trust's administrative expenses and the postconfirmation interest were incurred because the Bank's plan wrongfully subordinated MCJV's claims, 913 F.2d at 880, and failed to provide for the payment of income taxes, 161 B.R. at 307; and "[t]he trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, *Restatement (2d)*, § 178. A trustee is also "under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such compliance . . . would be injurious to the interest of the beneficiary." *Restatement (2d)*, § 166(2).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE B. GOULD, *pro se*
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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10536
Non-Argument Calendar

D.C. Docket No. 98-02669-CV-EBD

IN RE: HOLYWELL CORPORATION,
et al.,
Debtors.

THEODORE B. GOULD,
Plaintiff-Appellant,

versus

BANK OF NEW YORK,
FRED STANTON SMITH, as Trustee
of the Miami Center
Liquidating Trust,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

(January 13, 2000)

Before COX and WILSON, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Theodore Gould, *pro se*, appeals from the district court's order affirming the bankruptcy court's dismissal of his crossclaims, counterclams [sic], and third-party claims, and denial of his motions for joinder and for trustee's accounting in Adversary Proceeding 95-0481.

First, Gould argues that the bankruptcy court erred in dismissing his crossclaims, counterclaims, and third-party claims because (1) he has an unqualified fundamental right of self-representation, (2) his claims are not barred by the doctrines of res judicata and collateral estoppel, (3) his claims are not barred by the state statute of limitations, and (4) the plain language of Federal Rule of Civil Procedure 41(a)(3) prohibits the granting of a plaintiff's motion to dismiss unless the counterclaims/crossclaims can remain pending.

In his reply brief, Gould maintains the effect of the district court's affirmance of the dismissal of his counterclaims and crossclaims by the bankruptcy court was to foreclose his access to the courts. He also argues that application of Florida's statute of limitations would defeat the purpose of the Bankruptcy Code which is to give the debtor a fresh start.

Next, Gould argues that the bankruptcy court's denial of his motions violated Federal Rule of Civil Procedure 15(b). Further, he maintains that the denial of his motion to amend his complaint to add indispensable parties violated Federal Rule of Civil Procedure 19(a).

Finally, Gould maintains that the bankruptcy court did not have subject-matter jurisdiction because this adversary proceeding was not a case under the Bankruptcy Code. In his reply brief, Gould contends that the

Bank's claims against the Trust do not constitute a "core proceeding."

This Court reviews the bankruptcy court's dismissal of claims for abuse of discretion. *World Thrust Films, Inc. v. International Family Entertainment, Inc.*, 41 F.3d 1454, 1456 (11th Cir. 1995). This Court reviews questions of law, including jurisdictional questions, *de novo. Munford v. Munford (In re Munford)*, 97 F.3d 449, 453 (11th Cir. 1996).

We have reviewed the record and considered the briefs and find no reversible error.

Theodore Gould, Holywell Corporation, Miami Center Limited, Partnership, Miami Center Corporation, and Chopin Associates borrowed money from the Bank of New York (the Bank) to finance a construction project in Miami. *Holywell Corp. v. Smith (In re Holywell Corp.)*, 967 F.2d 568, 569 (11th Cir. 1992). The business venture defaulted, the Bank foreclosed, and Gould and the corporations filed voluntary Chapter 11 petitions in 1984. The bankruptcy court consolidated these cases and the Bank proposed a plan of reorganization which was confirmed and became effective in 1985. *Holywell*, 967 F.2d at 569. The plan created the Miami Center Liquidating Trust in 1985. *Id.* The bankruptcy court appointed Fred Stanton Smith as the Trustee. *Id.*, at 569-70.

Gould has been repeatedly sanctioned by the bankruptcy court. In 1987, Gould defied the bankruptcy court's order to dismiss certain lawsuits filed in Virginia. *Id.* at 570. In 1990, the bankruptcy court issued an order of certification of contempt and, as part of its sanctions, required that "an attorney admitted to practice before the United States District Court for the Southern District of

Florida and the United States Bankruptcy Court, be required to sign all further pleadings for or on behalf of Theodore B. Gould. . . . " (R1-10, Exh. B at 6; *See also Holywell*, 967 F.2d at 570 n.3). The bankruptcy court stated that it imposed the requirement because Gould continually attempted to raise issues on a serial basis. (*Id.*, Exh. B at 6). The district court accepted the bankruptcy court's contempt order and this Court affirmed. *Holywell*, 967 F.2d at 570.

Smith, as trustee of the Miami Center Liquidating Trust, filed a complaint, Adversary Proceeding 95-0481, against Miami Center Joint Venture (MCJV), Olympia & York Florida Equity Corporation (O&Y), the Bank, and Gould seeking declaratory judgment as to (1) the amount and validity of the Trust's alleged debt to MCJV, and (2) the priority as between the claim of O&Y and the Bank to the Trust's interest in MCJV. In addition, the trustee filed a second amended complaint that included the prior claims and further alleged that Gould, MCJV, and O&Y were guilty of breach of contract (count 2); conspiracy to commit fraud and misrepresentation (count 3); fraud and misrepresentation (count 4); and, breach of fiduciary duty (count 5). The trustee also sought the imposition of a constructive trust on MCJV property and O&Y's right to payment from MCJV (count 6).

Gould, proceeding *pro se*, moved the court to amend his answer to the second amended complaint and file counterclaims against Smith, individually and as a trustee for Miami Center Liquidating Trust. He asserted that Smith breached his fiduciary duty (counterclaim 1) and committed fraudulent misrepresentation (counterclaim 2). In addition, Gould asserted crossclaims against the

Bank alleging negligent misrepresentation (cross-claim 1) and equitable indemnification (crossclaim 2). He also joined Stettin, the Trustee's attorney, as a defendant. Gould next filed a motion to join Holland and Knight, Irvin Wolff, Arthur Andersen, LLP, Donald A. Denkhaus, C.P.A., Allen B. Fisher, C.P.A., and Gregory F. Wilder, C.P.A. as defendants.

In addition, Gould filed a motion in the main bankruptcy case to require Smith, as Trustee, to file an adversary proceeding against the Bank for reimbursement of administrative expenses plus lost interest. The bankruptcy court granted Gould permission to bring the claim as a counterclaim in Adversary Proceeding 95-0481.

Subsequently, involuntary bankruptcy petitions were filed in the United States Bankruptcy Court for the Southern District of New York for O&Y and MCJV. The bankruptcy court granted the trustee's motion to drop MCJV and O&Y as defendants and approved a settlement between the trustee and O&Y and MCJV.

Smith, Stettin, and the Bank moved the bankruptcy court in a joint motion to dismiss with prejudice Gould's counterclaims, third-party claims, and crossclaims and to close Adversary Proceeding 95-0481. They maintained that the bankruptcy court's prior orders barred Gould from filing any claims *pro se,* that Gould's crossclaim against the Trustee and his third-party claim against Stettin and his law firm were also barred by the law of the case. In addition, they argued that Gould's claims against the Bank were moot pursuant to this Court's opinion in *Miami Center Ltd. Partnership v. The Bank of New York,* 838 F.2d 1547 (11th Cir.), *cert. denied,* 488 U.S. 823 (1988).

Further, they contended that all the claims were barred by the applicable statute of limitations, Fla. Stat. § 95.11. The movants requested the court dismiss their claims against Gould without prejudice.

In response, Gould argued the bankruptcy court's order barring him from proceeding *pro se* violated the Fifth Amendment, was contrary to 28 U.S.C. § 1654, and was a legal nullity. Further, Gould maintained that Florida's statute of limitations did not apply because this case concerned a federally-created right whose sole remedy is in equity. Additionally, he contended that Fed.R.Civ.P. 41(a) barred voluntary dismissal of the adversary proceeding unless Gould's counterclaims and cross-claims remained.

The bankruptcy court held a hearing and considered Gould's motions to amend his answer and add six additional parties. The Bank argued that the bankruptcy court's December 9, 1997, order required all claims to be filed in the bankruptcy court subject to the bar date and Gould's failure to comply with this order made his claims untimely. Further, on May 1, 1990, the bankruptcy court required that any pleadings filed by Gould be signed by an attorney admitted to practice before the United States District Court for the Southern District of Florida. In addition, it alleged that the motion to amend did not state any cognizable claim. Next, the Bank requested the court to grant the joint motion of the trustee and the Bank to dismiss the remainder of the adversary proceeding because the claims against O&Y and MCJV were settled. Gould responded that the bankruptcy court lacked subject-matter jurisdiction over this proceeding.

The bankruptcy court, noting that its December 9, 1997, order required any party asserting claims to file them, found that the claims asserted in Adversary Proceeding 95-0481 were pending at the time and thus, were timely. All other claims were untimely. The bankruptcy court next dismissed Gould's crossclaims, counterclaims, and third-party claims because he failed to obtain local counsel prior to filing his claims as required by court order and because Gould failed to pay $29,000 in court-ordered sanctions. The court granted the Bank's motion to dismiss its claim against Gould and granted the trustee's motion to dismiss without prejudice the trustee's claim against Gould. Finally, the bankruptcy court found Gould's motion to amend moot. The bankruptcy court ordered Adversary Proceeding 95-0481 closed.

Gould appealed the bankruptcy court's order to the district court. The district court found that Gould's failure to comply with the contempt order provided a sufficient basis for the bankruptcy court to dismiss his counterclaims and crossclaims. Because the bankruptcy court did not err in dismissing Gould's claims, there was no bar to the dismissal of the adversary proceeding as there were no counterclaims or crossclaims pending. Additionally, the district court found that Gould's claims of fraud and breach of fiduciary duty were barred by the statute of limitations, res judicata, and collateral estoppel.

Issue 1: Dismissal of crossclaims, counterclaims and third-party claims

Gould argues that the district court violated 28 U.S.C. § 1654 because he has an unqualified fundamental right of self-representation. He further maintains that the district court erred in applying the doctrines of res judicata and collateral estoppel in dismissing his crossclaims, counterclaims, and third-party claims because his claims had not been previously litigated. In addition, Gould maintains that (1) the bankruptcy court did not dismiss his crossclaims and counterclaims based on Florida's statute of limitations; and (2) Florida's statute of limitations had not run because four years had not elapsed between the time he discovered the alleged fraud and the filing of his claims. He maintains that the rights he asserted are federally created rights for which his sole remedy is in equity, and, therefore, Gould argues the district court erred in applying Florida's statute of limitations for fraud. Finally, Gould contends that the plain language of Federal Rule of Civil Procedure 41(a)(3) prohibits the granting of plaintiff's motion to dismiss unless the counterclaim/crossclaims can remain pending.

In response, the Bank maintains that (1) Gould lost his appeal of the contempt order requiring him to have an attorney file pleadings and, therefore, he is barred from collaterally attacking it in this case, and (2) the bankruptcy court had the discretion to restrict Gould's filings on the basis of his prior behavior. The Bank argues that federal courts generally apply the forum state's statute of limitations unless it defeats the federal statute's goals.

Gould failed to identify any statutory or equitable principle violated by applying Florida's statute of limitations.

In his reply brief, Gould maintains the effect of the district court's affirmance of the dismissal of his counterclaims and crossclaims by the bankruptcy court was to foreclose his access to the courts. He also argues that application of Florida's statute of limitations would defeat the purpose of the Bankruptcy Code, which is to give the debtor a fresh start.

The record establishes that the bankruptcy court dismissed Gould's claims for failure to comply with orders of the court; more specifically, the orders to pay sanctions and to have an attorney file any pleadings for Gould. In the bankruptcy case as a whole, the records show that Gould has shown a pattern of willful contempt of the bankruptcy court's orders. As the bankruptcy court stated in the final decree,

> [i]t has taken over thirteen (13) years to reach the point where the case is ready for closure. An important reason for the delay has been the more than 140 separate appellate proceedings (substantially all of which were initiated by the Debtors) to the District court, to the 11th Circuit and to the Supreme Court. . . . It is safe to conclude that this was one of the most contentious and highly litigated bankruptcy cases in the Southern District of Florida, if not the entire United States. . . . The Debtors, and in particular Theodore B. Gould, (Gould), have asserted claims against the Trustee for breaches of fiduciary duty to the Trust and to its beneficiaries. Gould has attempted – repeatedly and often

> frivolously – to sue the present and former lawyers and the accountants for the Trust for misconduct and malpractice. . . . He has been found in contempt by this Court on three occasions for misconduct involving conversation of estate property and repeated abuse of the judicial process.

(R1-10, Final Decree). As noted by the bankruptcy court, litigation in this case has been unending and most of it was frivolous.

Gould's argument that he has an unqualified right to represent himself is without merit. This Court, in *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986), recognized limitations on the right to represent oneself. The test is whether the restriction imposed by the court serves as an absolute bar to filing any suit in a federal court. *Id.* at 1071. In *Procup*, the district court barred a federal prisoner serving a life sentence from filing any case without an attorney filing it for him. This Court found that this restriction would foreclose him from filing any suits at all. *Id.*

This case is distinguishable from *Procup* on several grounds. First, this is a bankruptcy case involving a sophisticated businessman and not a prisoner. Second, this restriction is limited to proceedings in the overall bankruptcy case and does not foreclose the federal courts to Gould as a whole. Third, and, most significantly, this Court has already upheld the contempt order in question. We agree with the bankruptcy court and the district court.

Issue 2: Denial of Motion to Amend Counterclaims and Crossclaims, Motion for Trustee's Accounting and Motion to Join

Gould argues that the bankruptcy court's denial of his motions violated Federal Rule of Civil Procedure 15(b). Further, he maintains that the denial of his motion to amend his complaint to add indispensable parties violated Federal Rule of Civil Procedure 19(a).

In response, the Bank argues that Gould does not demonstrate any abuse of discretion because he failed to show the parties were indispensable. Further, it maintains that his attempts to raise the issues would have been futile due to laches, statute of limitations, and prior adjudications.

Because we uphold the district court's holding dismissing Gould's crossclaims, counterclaims, and third-party claims, this Court need not reach these issues.

Issue 3: Jurisdiction of Bankruptcy Court

Gould maintains that this adversary proceeding was not a case under Title 11, the Bankruptcy Code, because it involves post-confirmation events. Gould contends that the Bank's claims against the Trust do not constitute a "core proceeding," and therefore, the bankruptcy court did not have subject-matter jurisdiction.

Bankruptcy courts have jurisdiction "to hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section. . . . " 28

U.S.C. § 157(b)(1). Core proceedings include matters concerning the administration of the estate and other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship. *See* 28 U.S.C. § 157(b)(2)(A) & (O). Section 1142(b) provides, "[T]he court may direct the debtor and any other necessary party . . . to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan." 28 U.S.C. § 1142(b). Federal Rule of Bankruptcy Procedure 3020(d) states, "[N]otwithstanding the entry of the order of confirmation, the court may enter all order necessary to administer the estate."

The confirmation plan "empowered the trustee to 'manage, operate, improve, and protect the Trust Property. . . . ' " *Holywell Corp. v. Smith*, 503 U.S. 47, 51, 112 S.Ct. 1021, 117 L.Ed.2d 197 (1992) (quoting, Consolidated Plan of Reorganization). The plan further provided,

> The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree, in respect to the following matters.
>
> (a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;
>
> * * * *
>
> (d) to allow or disallow any claim; and
>
> (e) to make any orders which may be necessary or appropriate to carry out the provisions of this

> Plan, including any orders related to the reservation of equitable rights set forth in Article XIII hereof.

(R1-10, Exh. May 17, 1991 order quoting Article XIV, Retention of Jurisdiction).

In this instance, the trustee filed an adversary proceeding to determine the amount and validity of the Trust's alleged debt to MCJV, and the priority as between the Claims of O&Y and the Bank to the Trust's interest in MCJV. These matters clearly deal with the consummation of the plan and the bankruptcy court has the authority to enter any order necessary to accomplish that purpose. Further, this adversary proceeding involves a core proceeding because it involves a matter regarding allowance and estimation of claims involving the trust. *See* 28 U.S.C. § 157(b)(2). Gould's claim that the bankruptcy court does not have jurisdiction is without merit.

We find that the bankruptcy court had jurisdiction in Adversary Proceeding 95-0481 and that it did not abuse its discretion in dismissing Gould's crossclaims, counterclaims, and third-party claims. Subsequently, Gould's arguments regarding the denial of his motions are moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FRED STANTON SMITH,

Plaintiff,

v.

MIAMI CENTER JOINT VENTURE, et al,

Defendants.
_____/

CASE NO. 98-2669-CIV-DAVIS

ORDER

(Filed Mar. 5, 1999)

This matter is before the Court pursuant Theodore Gould's Initial Brief (filed December 3, 1998) appealing from the Bankruptcy Court's: (1) dismissal of his counterclaims, (2) dismissal of his motion to join additional defendants to those counterclaims and (3) granting of the Trustee/Plaintiff's motion to voluntary [sic] dismiss its claims. Gould argues, *inter alia*, that the decision of the Bankruptcy Court (1) deprived him of his constitutional right to a trial by jury, (2) violated his right to self-representation and (3) violated several Federal Rules of Civil Procedure. This Court heard oral argument on March 3, 1999.

STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are subject to the clearly erroneous standard of review. *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985). Questions of law are subject to the *de novo* standard of review. 11 U.S.C. Bankruptcy Rule 8013.

DISCUSSION

Effect of Contempt Order

Gould first argues that the Bankruptcy Court's order should be overturned because his counterclaims were dismissed in reliance on a contempt order that barred Gould from filing claims without the representation of counsel. Even if the contempt order were the Bankruptcy Court's only basis for dismissing those claims (and it was not), Gould's arguments would be unsuccessful.

Gould had been found in contempt of court for filing frivolous claims and abusing the judicial process. *See* Order dated May 1, 1990 and affirmed by order of the District Court dated May 21, 1991 (collectively, the "Contempt Order"). As a result, he was required to be represented by counsel in all subsequent matters relating to the bankruptcy proceedings.[1] Gould, however, ignored the Contempt Order and chose not to be represented by counsel when he filed the counterclaims at issue in this appeal. This failure to comply with the Contempt Order would have been a sufficient basis to dismiss Gould's counterclaims and cross-claims.

Voluntary Dismissal by Trustee

Gould next argues that the Bankruptcy Court erred when it allowed the Trustee to voluntarily dismiss its claims against Gould. Gould believes that the Bankruptcy

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[1] The right to self-representation is not limitless and may be curtailed if, as the Bankruptcy Court long ago concluded about Gould, a pro se litigant has abused the right. *See U.S. v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972).

Court's denial of his own motion for summary judgment to dismiss those claims because it found that there was a genuine issue of material fact means that dismissal was not appropriate. The existence of a genuine issue of material fact would in no way prevent the Trustee himself from voluntarily dismissing his own claims.

Gould is correct to argue that an action may not be dismissed against the defendant's objection unless the counterclaim can remain pending. *See* Fed.R.Civ.P. 41(a). Gould, however, is incorrect when he suggests that the dismissal of the Trustee's claims somehow terminated his counterclaims and cross-claims. Gould's counterclaims and cross-claims did remain pending, but the Bankruptcy Court dismissed them. The voluntary dismissal was appropriate.

Denial of Motions to Amend and to Join Additional Defendants

Gould also states, but does not explain how or why, that the Bankruptcy Court improperly denied his motion to amend his counterclaims and his motion to join third party defendants. Gould argues that the statute of limitations has not run, but even if it did, the Bankruptcy Court's reliance on Florida's statute of limitations to dismiss his "counterclaims, cross-claims and third-party claims is contrary to the equity rules of jurisprudence." This thin argument is not persuasive.

The Bankruptcy Court had already found in 1994 that these same claims alleging, *inter alia*, fraud and breach of fiduciary duty (which are now Gould's counterclaims)

were barred by the statute of limitations, collateral estoppel and *res judicata*. *See* Order dated June 13, 1994. Nothing has changed to make those claims suddenly viable.[2] Because those claims are barred, it was proper for the Bankruptcy Court to deny Gould's Rule 19 motion to join the third party defendants to those claims.

CONCLUSION

This appeal is only the most recent example of Gould's attempt to further delay the final resolution of this bankruptcy proceeding which was initiated more than 10 years ago. As with Gould's other frivolous claims and appeals, this one also lacks merit. Accordingly, it is

ORDERED AND ADJUDGED that the orders and final decree of the Bankruptcy Court are affirmed in their entirety.

DONE AND ORDERED in Miami, Florida on this 5th day of March, 1999.

/s/ Edward B. Davis
Edward B. Davis
Chief United States
District Judge

---

[2] The Court notes that Gould makes no attempt to dispute the application of collateral estoppel to his claims.

copies furnished:
Bankruptcy Judge Hyman

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	:	CASE NO.
HOLYWELL CORP., *et al.*,	:	84-01590/
	:	94-BKC-PGH
Debtors.	:	
	:	
FRED STANTON SMITH, Trustee,	:	
	:	Adv. Pro. No.
Plaintiff,	:	95-0481-BKC-PGH-A
	:	
v.	:	
	:	
MIAMI CENTER JOINT VENTURE, *et al.*,	:	
	:	
Defendants.	:	

ORDER DENYING GOULD'S MOTION TO ADD THIRD-PARTY DEFENDANTS, AND GRANTING JOINT MOTION TO DISMISS REMAINING CLAIMS WITH PREJUDICE AND TO CLOSE ADVERSARY PROCEEDING

This matter having come before the Court for hearing on August 13, 1998, upon (a) the motions of debtor/defendant Theodore B. Gould ("Gould") to amend his counterclaims to add six third-party defendants to his counterclaim in this action, and (b) the Joint Motion to Dismiss With Prejudice the Counterclaim, Cross-Claim, and Third-Party Claims of Theodore B. Gould, *pro se*, and to Close Adversary Proceeding (the "Joint Motion"), filed by Fred Stanton Smith (the "Trustee"), as Liquidating Trustee, and by The Bank of New York, the principal creditor of these estates; adequate notice having been

given; the Court having heard and considered the motions and responses; and having heard argument of counsel and of Gould; good cause appearing, and the Court being fully advised in the premises, for the reasons stated by the Court on the record, it is

ORDERED that Gould's motions to amend are DENIED; and

ORDERED that the Joint Motion is GRANTED. The counterclaim, cross-claim, and third-party claims by Gould are DISMISSED WITH PREJUDICE and the Trustee's claims against Gould are DISMISSED WITHOUT PREJUDICE; and it is further

ORDERED that this adversary proceeding is CLOSED.

ORDERED in the Southern District of Florida, this 13 day of August, 1998.

PAUL HYMAN
Paul G. Hyman, Jr.
United States
Bankruptcy Judge

Conformed copy to:

Vance E. Salter, Esq.

[Attorney Salter is directed to serve a copy of the foregoing on all parties and counsel entitled to notice.]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	Case No.: 84-01590/94-BKC-PGH
HOLYWELL CORPORATION, et al.,	CHAPTER 7
Debtors.	
_____/	
FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust,	Adv. No.: 95-0481-BKC-PGH-A
Plaintiff,	
vs.	
MIAMI CENTER JOINT VENTURE, OLYMPIA & YORK FLORIDA EQUITY CORPORATION, THE BANK OF NEW YORK, and THEODORE B. GOULD,	
Defendants.	
_____/	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court upon Theodore B. Gould's (the "Defendant") Motion for Summary Judgment filed on June 24, 1998. In the Motion for Summary Judgment, the Defendant asserts that there are no genuine issues as to any material facts and that summary judgment should be granted in his favor and moves for the dismissal of the allegations in Counts II, II [sic], and IV of the Second Amended Complaint filed on October 7,

1988 by the Plaintiff herein, Fred Stanton Smith, as the trustee of the Miami Center Liquidating Trust. The court has reviewed the Defendant's Motion for Summary Judgment and the responsive pleadings presented to the Court.

The Court, in reviewing a motion for summary judgment, is guided by the standard set forth in Federal Rule of Civil Procedure 56(c), made applicable to adversary proceedings by Bankruptcy Rule 7056, which states, in relevant part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party bears the burden of meeting this exacting standard. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). That is, "[t]he moving party bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *U.S. v. Four Parcels of Real Prop.*, 941 F. 2d 1428, 1437 (11th Cir. 1991) *quoting Celotex*, 477 U.S. at 323. In assessing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party. *Browning v. Peyton*,

918 F. 2d 1516, 1520 (11th Cir. 1990); *Clemons v. Dougherty County*, 684 F. 2d 1365, 1368 (11th Cir. 1982).

The Court finds that the Defendant has not met this standard. The material facts presented by the Defendant are insufficient to establish a basis for granting the Motion for Summary Judgment. In accordance with the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

The Motion for Summary Judgment is Denied.

DONE AND ORDERED in Fort Lauderdale, Florida, this 4th day of August, 1998.

/s/ Paul Hyman
PAUL G. HYMAN, JR.
United States
Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

HOLLYWELL CORPORATION et al.

Debtor.
_____/

CASE NO.: 84-01590-BKC-PGH,

FRED STANTON SMITH, as Trustee of the Miami City Center Liquidating Trust,

Plaintiffs,

v.

MIAMI CENTER JOINT VENTURE, OLYMPIA & YORK FLORIDA EQUITY CORPORATION, THE BANK OF NEW YORK, and THEODORE B. GOULD,

Defendants,
_____/

ADV. NO.: 95-0481-BKC-PGH

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE JURY TRIAL DEMAND

THIS MATTER came before the Court upon Plaintiff's, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust (the "Plaintiff"), Motion to Strike Jury Trial Demand (the "Motion") and Defendants', Olympia & York Florida Equity Corporation and Miami Center Joint Venture (the "Defendants"), Response in Opposition to Plaintiff's Motion to Strike Jury Trial Demand and Memorandum in Support (the "Response") and the Court

having reviewed the Motion and Response and other relevant pleadings and having considered the oral arguments of counsel at the hearing on April 29, 1996, hereby:

ORDERS AND ADJUDGES that:

1. The Plaintiff's Amended Adversarial Complaint (the "Complaint") contains six counts against the Defendants: (1) Declaratory Relief; (2) Breach of Contract; (3) Conspiracy to Commit Fraud and Misrepresentation; (4) Fraud and Misrepresentation; (5) Breach of Fiduciary Duty; and (6) Imposition of a Constructive Trust (the "Claims"). The Defendants filed an Answer to the Complaint (the "Answer") demanding a trial by jury for all issues so triable (the "Jury Demand").

2. Plaintiffs assert that this Court should deny Defendants' Jury Demand on three grounds. First, Plaintiffs state that none of the issues in this adversarial proceeding are triable because they arise out of partner-based fiduciary duties, which are equitable causes of action. Second, Plaintiffs assert that since the Claims involve post-petition acts regarding the administration of the bankruptcy estate, the Claims are triable by this Court. Finally, Plaintiffs contend that since the Defendants have sought the aid of this Court in other matters, as well as in the capacity of counterclaimants, the Plaintiffs have waived their right to a jury trial.

3. Defendants assert, however, that pursuant to the Plan, the Plaintiff acquired the interest of Theodore B. Gould ("Gould") in Miami City Joint Venture ("MCJV") and initially sought a declaration as to whom the Plaintiff should tender such interest. Defendants contend that the Plaintiff is now seeking money damages based on legal

breach of contract and fraud claims. Defendants state that since the Claims are not truly rooted in equity, the Defendants are entitled to a trial by jury pursuant to the Seventh Amendment of the United States Constitution.

4. In *Granfinanciera, S.A. et al. v. Paul C. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corp., etc.*, 494 U.S. 33, 40-41, 109 S.Ct. 2782, 2789-2790 (1989), the United States Supreme Court developed a two-part test for determining whether a claim is legal, as opposed to equitable, for purposes of a trial by jury pursuant to the Seventh Amendment of the United States Constitution. According to the United States Supreme Court, "[f]irst we compare . . . the action to 18th century actions brought in the courts of law and equity. Second, we examine the remedy and determine whether it is legal or equitable in nature." *Id.* at 42, 109 S.Ct. at 2790 (*citing Tull v. United States*, 481 U.S. 412, 417-18, 107 S.Ct. 1831, 1835 (1987)). The Court also noted that "[t]he second stage of this analysis is far more important than the first." *Id.*

5. Furthermore, the Seventh Amendment right to a jury trial attaches to actions seeking monetary damages. *Official Committee of Unsecured Creditors, on behalf of the Estate of Stansbury Polar Place, Inc. et al. v. Milton Schwartzman et al. (In re Stansbury)*, 13 F.3d 122, 125-26 (4th Cir. 1993). Citing to the United States Supreme Court in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 n. 8, 82 U.S. S.Ct. 894, 896-99 n. 8 (1962), the Fourth Circuit in *In re Stansbury*, held that "where both legal and equitable issues are presented in a single case, only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims. This is true regardless of whether the legal claims

are characterized as incidental to the equitable claims; as long as there is a legal claim, the jury trial rights it creates control." 13 F.3d at 125. In addition, the United States Supreme Court in *Dairy Queen*, 369 U.S. 469, 477-478, 82 S.Ct. 894, 900 (1962) held that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for . . . all other equitable remedies, is . . . the absence of an adequate remedy at law." *In re Stansbury*, 13 F.3d at 125.

6. In addition, it is well established that neither a creditor nor a debtor automatically waives a right to a jury trial whenever a proof of claim is filed in a bankruptcy proceeding. *R. Dobie Langenkamp v. C.A. Culp et al.*, 498 U.S. 42, 44-45, 111 S.Ct. 330, 331 (1990); *Thomas M. Germain, Trustee v. the Connecticut Nat'l Bank*, 998 F.2d 1323, 2330 (2nd Cir. 1993). As stated by the Second Circuit in *Germain*, "for a waiver to occur, the dispute must be part of the claims-allowance process or affect the hierarchical reordering of creditors' claims." *Id.*; *Growers Packing Co. v. Community Bank of Homestead*, 134 B.R. 438 (S.D. Fla. 1991).

7. In the Complaint, the Plaintiff seeks money damages pursuant to the breach of contract, breach of fiduciary duty and fraud claims. In addition to seeking money damages, the Plaintiff seeks imposition of a constructive trust. Even if some claims are legal, a party will not be denied a jury trial just because other claims arising out of the same facts are equitable. *Germain*, 988 F.2d at 1329.

8. This Court finds that the Plaintiff's basis for relief rests with the purported breach of a June 26, 1986 agreement and purported fraud associated therewith, irrespective of the labels attached to or the nature of the other claims. Since the remedy sought by the Plaintiff is legal in nature, this Court finds that Defendants have the right to a trial by jury on the Claims, unless such right has been waived.

9. This Court finds that the Claims do not "arise as part of the process or allowance and disallowance of claims." *Granfinanciera*, 492 U.S. at 58, 109 S.Ct. at 2799. Nor are "the Claims integral to the restructuring of debtor-creditor relations." *Id.* Instead, the Claims are brought by the Trustee against non-creditor third parties to augment the Miami Center Liquidating Trust. This Court, therefore, finds that the Defendants have not waived their right to a trial by jury and are entitled to exercise such right pursuant to the Seventh Amendment of the United States Constitution.

10. The parties shall consult and submit to the Court a proposed Scheduling Order that meets the requirements of Federal Rule of Civil Procedure 16(b), as adopted by Federal Rule of Bankruptcy Procedure 7016.

DONE AND ORDERED in Ft. Lauderdale, Florida this 31st day of May, 1996.

/s/ Paul G. Hyman, Jr.
PAUL G. HYMAN, JR.
United States Bankruptcy Judge

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(Attorney Stettin shall serve a copy of this Order immediately upon receipt to all interested parties, except those listed herein.)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORP., *et al.*,

Debtors,

ORDER DIRECTING CLOSING OF CHAPTER 11 CASE

The creditor's chapter 11 plan was confirmed on August 8, 1985.

Transfer of all or substantially all of the property proposed by the plan to be transferred, assumption by the debtors or the successor to the debtors under the plan of the business or of the management of all or substantially all of the property dealt with by the plan, and commencement of distribution under the plan constitute substantial consummation of the plan under 11 U.S.C. § 1101.

The disbursing agent, liquidating trustee Fred Stanton Smith, is directed to submit an order for payment of dividends to provide for all payments to be made on the effective date of the plan, file a deposit and disbursement statement and submit checks and a bank statement covering the initial disbursements called for in the plan. When all checks for the initial disbursement have cleared, the liquidating trustee shall file a final report and application for final decree.

The court shall not retain jurisdiction beyond substantial consummation and granting of the final decree in accordance with these directions.

DONE and ORDERED in Miami, Florida this 28th day of April, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Chief Bankruptcy Judge

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III of the Constitution of the United States provides in part:

SECTION 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior. . . .

SECTION 2. The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made. . . .

---

2. The Seventh Amendment to the Constitution of the United States of America provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial of jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS INVOLVED

1. Section 1654 of Title 28, Judiciary and Judicial Procedure provides:

28 U.S.C. § 1654, Appearance personally or by counsel.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

---

2. Section 1334 of Title 28, *Judiciary and Judicial Procedure*, Provides, in part:

28 U.S.C. § 1334. *Bankruptcy cases and proceedings.*

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of

action, related to a case under title 11 [11 USCS §§ 101 et seq.] but not arising under title 11 or arising in a case under title 11 with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code [11 USCS § 362], as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

---

3. Section 157 of Title 28, *Judiciary and Judicial Procedure*, provides, in part:

28 U.S.C. § 157. **Procedures.**

(a) Each district court may provide that any or all cases under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district. (b)(1) Bankruptcy judges may hear and determine all cases under title 11 proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to

review under section 158 of this title [28 USCS § 158].

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate. . . .

. . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a

> case under title 11 [11 USCS §§ 101 *et seq.*] to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

4. Section 541 of the Bankruptcy Code of 1978, as amended providing in part:

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

---

5. Section 1141 of Title 11, the **Bankruptcy Code** of 1978, as amended, provides, in part:

> 11 USCS § 1141. **Effect of confirmation.**
>
> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(j) or this title, whether or not –

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title [11 USCS § 501];

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

---

6. Section 1142 of the **Bankruptcy Code** of 1978, as amended, provides:

11 USCS § 1142. **Implementation of Plan**

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

---

7. Section 350 of Title 11, the Bankruptcy Code of 1978, as amended, provides in part:

11 U.S.C. § 350. Closing . . . cases.

(a) After an estate is fully administered and the Court has discharged the trustee, the Court shall close the case. . . .

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

1. Rule 15, Amended and Supplemental Pleadings, provides, in part:

. . .

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the

merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

---

2. Rule 41, Dismissal of Actions, provides, in part:

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United

States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(2)

Supreme Court, U.S.
FILED
MAY 12 2000
CLERK

No. 99-1642

In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

vs.

FRED STANTON SMITH, HERBERT STETTIN, P.A., and THE BANK OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals and district court erred in affirming a bankruptcy court order denying and dismissing various counterclaims, crossclaims, and proposed third-party claims by Petitioner, based on Petitioner's refusal to comply with previously entered and final contempt and sanctions orders?

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STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1254(1). No jurisdiction exists, however, as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

Introduction

This case is the sixteenth attempt in this Court by the debtors in the consolidated bankruptcy proceeding – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The debtors have commenced and prosecuted, unsuccessfully in each instance, approximately 48 appeals to the court of appeals, and approximately twice as many

[1] Two additional petitions were filed by Mr. Gould on the same date as the petition here (Case Numbers 99-1643, 99-1644). Of the 15 previous petitions to this Court, 14 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court. The bankruptcy cases were finally closed in September, 1998.

appeals in the district court, in the fourteen years since a creditors' plan of reorganization was confirmed. For his serial, collateral attacks, the debtor/Petitioner has been sanctioned on several occasions. The present Petition is also frivolous.[2]

The Nature of the Case Below

This is the third level of review. Petitioner seeks review of an order of the court of appeals affirming a district court's affirmance of a bankruptcy court order. The bankruptcy court's order below granted the Trustee's motions (a) to dismiss with prejudice a number of claims by Petitioner after he refused to comply with previously-entered, final, contempt orders, and (b) to dismiss voluntarily the Trustee's remaining claims against Petitioner, without prejudice, so that the bankruptcy cases could be closed.

Course of the Proceedings

The underlying bankruptcies began in August, 1984. Petitioner and four entities controlled by him filed voluntary petitions under Chapter 11.

Respondent, The Bank of New York ("Bank") – the largest creditor (approximately $200 million) of the five debtors – filed an amended plan of reorganization

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[2] The debtor/Petitioner has been held in contempt and sanctioned repeatedly for attempting to relitigate previously decided issues, and for attempts to circumvent bankruptcy court rulings.

("Plan") which was approved by the creditors and the bankruptcy court in 1985.

The Plan provided for a Liquidating Trust as the vehicle for the marshaling of assets and payment of claims. Respondent Fred Stanton Smith, Liquidating Trustee ("Trustee"), was appointed by the bankruptcy court in 1985 to administer the Trust.

Other than a novel bankruptcy and federal tax issue reviewed by this Court in 1992[3] and over 100 appeals pursued by Petitioner, the collection of assets and payment of creditors was unremarkable.

As part of his refusal to comply with the Plan, Petitioner caused subsidiaries of a debtor to sue the Trustee and the Bank in Virginia. The Florida bankruptcy court held that this attempt to circumvent the Florida bankruptcies was contemptuous. The district court and the court of appeals affirmed. *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

On another occasion, Petitioner and his counsel were again held in contempt for filing frivolous and repetitive pleadings regarding previously-adjudicated claims.[4]

In 1994, the bankruptcy court entered another sanctions order against Petitioner, his co-debtors, and his Virginia attorney for asserting frivolous and repetitive claims against the Trustee. [Petitioner's App. 9.]

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[3] *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

[4] In 1997, Petitioner filed a motion under Federal Rule of Civil Procedure 60(b) to vacate the contempt order. The bankruptcy court denied the motion. Petitioner appealed to the district court and the court of appeals, each of which affirmed.

Petitioner has also been held in contempt for selling property of the Liquidating Trust and refusing to turn over the proceeds to the Trustee. The United States holds an unsatisfied judgment of over $1.3 million against Petitioner for those actions. Petitioner has not paid the sanctions, though they are final and non-appealable.

The Trustee commenced an adversary proceeding in the bankruptcy court in 1995 to determine the rights and obligations of the Miami Center Liquidating Trust regarding Petitioner's partnership interest in the Miami Center Joint Venture ("MCJV"). The Trustee alleged that Petitioner had circumvented a bankruptcy court order and settlement agreement by arranging "loans" from his joint venture partner that were actually distributions of his equity. Petitioner counterclaimed against the Trustee, crossclaimed against the Bank,[5] and sought leave to join as additional third-party defendants: (a) the Trustee's attorney and law firm, and (b) the Trustee's accountants.

Petitioner's partner in MCJV, Olympia & York Florida Equity Corporation ("O&Y"), commenced its own bankruptcy in New York City in 1996. Ultimately, the Trustee obtained a settlement with O&Y and that settlement was approved by the New York bankruptcy court. Based on a business and legal assessment that the remaining claims

---

[5] Certain of Petitioner's characterizations of previous opinions are misleading. For example, he asserts that the Bankruptcy Judge held that the dismissed crossclaims were "colorable" and that the Trustee unjustifiably refused to pursue them. The quoted portions of those opinions show that the judge was merely stating that colorability was the test for whether there was an unjustifiable refusal.

against Petitioner were not worth the cost and delay of further prosecution (particularly in light of the $1.3 million unsatisfied contempt judgment held by the United States), the Trustee then moved to voluntarily dismiss without prejudice those claims.

In addition, the Trustee and the Bank jointly moved the bankruptcy court to deny Petitioner's motion to add additional third-party defendants and to dismiss with prejudice Petitioner's counterclaims, crossclaims, and proposed third-party claims. The Trustee and the Bank then moved for and obtained the entry of a final decree in the five consolidated bankruptcy cases so that they could be closed.

The bankruptcy court granted the motions for dismissal, and Petitioner appealed. The district court affirmed in an order entered March 5, 1999. [Petitioner's App. 14.] Petitioner then moved the district court to vacate or amend that order and to permit a further hearing on the matters raised by the motion. Both motions were denied on April 2, 1999. Petitioner next appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court. [Petitioner's App. 1.] This petition for certiorari followed.

The only material facts in the record here are not in dispute. The contempt orders and sanctions order were entered and unsuccessfully appealed; Petitioner refused to comply with the requirements of the contempt and sanctions orders; Petitioner's claims had already been asserted and denied numerous times before, and the

bankruptcy court dismissed Petitioner's claims as a result.

SUMMARY OF ARGUMENT

The bankruptcy court, district court, and court of appeals committed no error. Petitioner, though a non-lawyer, must comply with court orders if he wishes to prosecute his claims and appeals. His right to self-representation is not a license to disregard court orders, to refuse to pay court-ordered sanctions, and to endlessly reassert previously-adjudicated arguments. The right to self-representation, like any other right, may be waived if abused.

ARGUMENT

I. Self-Representation

Petitioner's self-representation argument was lost years ago when he unsuccessfully appealed the bankruptcy court's certification of contempt. That order required, "that an attorney admitted to practice before the United States District Court for the Southern District of Florida and the United States Bankruptcy Court be required to sign all further pleadings filed for or on behalf of Theodore B. Gould," because Gould had continually attempted to raise issues on a serial basis. [Petitioner's App. 3.]

That final order may not now be collaterally attacked here. Petitioner failed to comply with that order, failed to

pay the contempt judgment entered by a district judge, and failed to pay a further sanctions award to the Trustee ordered by the bankruptcy court in 1994.

Petitioner has not cited any case[6]– because no such case exists – for the proposition that a *pro se* litigant may prosecute claims while in violation of court orders such as these. The latitude, patience, and deference accorded to *pro se* parties is enormous, but not limitless.

Pro se parties may be sanctioned under Federal Rule of Bankruptcy Procedure 9011, and they have the same duties under that rule as an attorney. *In re Weiss*, 111 F.3d 1159, 1169 (4th Cir. 1997). Bankruptcy courts also have inherent power, as do other federal courts, to punish bad faith conduct amounting to the abuse of the litigation process. *In re Graffy*, 233 B.R. 894, 898 (Bankr. M.D. Fla. 1999) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123 (1991)).

Courts have repeatedly addressed the issue of, "attempting to stem the filing and litigating of patently frivolous lawsuits by overly litigious *pro se* litigators", in cases such as *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986), and *Traylor v. City of Atlanta*, 805 F.2d 1420 (11th

---

[6] Indeed, Petitioner's largely irrelevant citations are to cases involving whether a criminal defendant invoked the right to self-representation. Some directly contradict Petitioner's position. [Petition at 21 (citing *DeNardo v. Murphy*, 781 F.2d 1345, 1348 (9th Cir. 1986) ("Although litigiousness alone is no reason to enjoin future litigation, a frivolous claim by a litigious plaintiff may be extremely costly to defendants and can waste valuable court time.") (citation omitted) (affirming an injunction against future litigation), *cert. denied*, 476 U.S. 1111 (1966))].

Cir. 1986). Trial courts have, "considerable discretion in restricting the filings of such a litigator." *Traylor*, 805 F.2d at 1421. Petitioner was not foreclosed from any access to the bankruptcy court;[7] he simply had to comply with the contempt and sanctions orders, and to retain counsel as directed *or* to demonstrate why he should be relieved of that requirement. Petitioner failed or refused to do any of those things.

The district court correctly held that the right to self-representation may be lost by a litigant engaging in abusive or disruptive behavior. [Petitioner's App. 15 n. 1 (citing *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972)).]

II. Bankruptcy Court Jurisdiction

Petitioner claims that the bankruptcy court lacked jurisdiction. This issue was not raised by Petitioner in the court of appeals, and thus is not addressed in the opinion below. It has, however, been repeatedly raised by Petitioner in other appeals too numerous to list here.

Petitioner takes the peculiar position that the bankruptcy court lacked jurisdiction to dismiss his counterclaims and crossclaims, which he filed in the bankruptcy court. If that court lacked jurisdiction, however, then it would have had to dismiss the claims for lack of subject matter jurisdiction and the result would be the same.

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[7] Petitioner was allowed to appear in both the bankruptcy court and the district court to argue why he should not be required to comply with the prior contempt and sanctions orders.

The court of appeals rightly pointed out that the bankruptcy court had jurisdiction pursuant to the terms of the plan of reorganization, 28 U.S.C. § 157(b)(1), and 11 U.S.C. § 1142(b). [Petitioner's App. 11-13.] The Liquidating Trust was created to liquidate the assets of the consolidated bankruptcy estates. The lawsuit in question concerned the Liquidating Trustee, the professionals of the Trustee who were hired to assist in the liquidation, the only remaining creditor, and the debtor/Petitioner. The claims raised by the Petitioner were collateral attacks on the plan of reorganization itself. Nevertheless, the Petitioner takes the position that the bankruptcy court had no jurisdiction to hear any matters once the plan was confirmed. There is simply no support for this argument.[8]

The Petitioner himself affirmatively invoked the bankruptcy court's jurisdiction (as he has in the past) by seeking permission to bring his counterclaims and cross-claims. By affirmatively invoking the bankruptcy court's jurisdiction over such matters, the Petitioner has waived any complaint about the bankruptcy court exercising such jurisdiction.

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[8] The cases cited by Petitioner are not helpful to his position. For example, in *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), the plan was being invoked to establish bankruptcy court jurisdiction over a products liability suit brought four and a half years after the bankruptcy case closed by a consumer against the entity that purchased assets from the estate. The connection to the bankruptcy case there was too tenuous; it was not a case by or against a debtor, and the outcome did not affect distribution. Here, however, suit was brought by the debtor/Petitioner in order to claim assets of the Liquidating Trust, the purpose of which was to liquidate the assets of the estate for distribution to creditors of the estate.

When a party files a noncore adversary proceeding in the bankruptcy court, it loses its ability to later object to the jurisdiction of the bankruptcy court. *Mann v. Alexander Dawson Inc. (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990).

III. Trustee's Dismissal

Federal Rule of Bankruptcy Procedure 7041 (adopting Federal Rule of Civil Procedure 41) allows any party to dismiss its claims without prejudice. That rule also provides that, if there is a counterclaim, there may be no dismissal without prejudice unless the counterclaim may remain pending for independent adjudication. This rule serves to prevent a plaintiff from divesting a district court of jurisdiction in non-diverse cases by voluntarily dismissing the plaintiff's federal cause of action. *See, e.g., American Fin. Sys. Inc. v. Harlow*, 65 F.R.D. 94 (D. Md. 1974) (discussing the purpose and application of the rule). In this case, the bankruptcy court had jurisdiction over these core matters pursuant to 28 U.S.C. § 157(b)(2). Petitioner affirmatively invoked that jurisdiction by bringing his counterclaims and crossclaims. The counterclaims thus could have remained pending, had they been legally sufficient.

Petitioner misconstrues Rule 41(a)(2) and mistakenly argues that his counterclaims can never be determined adversely to him if they are to, "remain pending." This is an absurd reading unsupported by the case law. Invalid counterclaims will not prevent a voluntary dismissal without prejudice. *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1332 (11th Cir. 1984) (counterclaim invalid

because plaintiff immune from suit); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980); *Debruyn Produce Co. v. Sobiech*, Case No. 91 Civ. 7995, 1992 U.S. Dist. LEXIS 9744, at *13-14 (S.D.N.Y. June 30, 1992) (counterclaim that failed to state a claim will not prevent dismissal). Furthermore, because Petitioner's counterclaim was dismissed by the bankruptcy court in the same order, that counterclaim did not exist and could not serve as a basis for opposing the voluntary dismissal. *SEC v. Lorin*, 869 F.Supp. 1117, 1119 (S.D.N.Y. 1994) (dismissed counterclaims no bar to a voluntary dismissal).

Petitioner's counterclaims and crossclaims were barred by the doctrines of claim and issue preclusion, the statute of limitations, and by Petitioner's failure to comply with contempt orders. [Petitioner's App. 15-17.] Petitioner does not challenge those findings. Therefore, certiorari would be futile as the claims are barred even if all of the relief sought by the Petitioner were granted.

CONCLUSION

None of the appropriate grounds for certiorari are present. The three lower courts correctly and unanimously ruled that Petitioner's claims are barred, that the bankruptcy court had jurisdiction, and that the bankruptcy court properly exercised its discretion in denying the motion to amend, granting the Trustee's motion to voluntarily dismiss his claims, granting the Respondents' joint motion for dismissal with prejudice of Petitioner's claims, and closing the cases.

For all these reasons, it is respectfully submitted that the writ should be denied.

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Nos. 99-1642, 99-1643, 99-1644

In The

Supreme Court of the United States

IN RE: THEODORE B. GOULD,

Petitioner.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The briefs in opposition[1] filed by the attorney for the respondents Bank of New York[2] ("Bank") and Fred Stanton Smith ("Smith")[3] show the importance of providing guidelines for the lower courts to resolve the principal questions presented in the three petitions for a writ of certiorari filed in these proceedings, which may be summarized as follows:

(1) Do the judgments, orders and opinions of the court of appeals, and the lower courts, conform to this Court's opinion, ***Holywell Corporation, et al. v. Smith,*** 503 U.S. 47, 54 (1992), that a trustee appointed after confirmation, to effect the liquidation of a discharged individual debtor's estate, is "the fiduciary of a trust of an individual"?

(2) Does a bankruptcy court have jurisdiction to enter final judgments, subject to appellate review, concerning the administration under State law of postconfirmation claims against the property of a new separate and distinct trust created in accordance with 11 U.S.C. § 1123(a)(5)(B)?

1. The Jurisdictional Issues

(a) The respondents' argument that "if the bankruptcy court had no subject matter jurisdiction over this adversary proceeding initially (as alleged by Petitioner),

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[1] The Solicitor General has waived his right to file a brief in opposition as a respondent in No. 99-1643.

[2] References herein to the briefs of the respondents in opposition will be cited as "No. 99-___ at ___."

[3] The court of appeals rejected the petitioner's objection on the grounds of conflict of interest to Smith's motion for the Bank's attorney to represent him as trustee of the Miami Center Liquidating Trust.

it would follow that the appellate courts – including this Court – lacked jurisdiction as well," *No. 99-1643* at 14, is a blatant false representation of the facts and the existing laws applicable in these proceedings.

First, this Court had appellate jurisdiction in the prior proceedings under 28 U.S.C. § 1254(1), because the opinion of the court of appeals was an erroneous judgment of law, which held:

> We dismiss, as moot, the allegation that the bankruptcy court lacked authority to confirm the Plan, and the allegation that the Bank of New York acted fraudulently in obtaining approval of the Plan. We accept jurisdiction to decide whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions. We hold, however, that neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes.

In re Holywell Corp., 911 F.2d 1539, 1546 (11th Cir. 1990). This Court held that the trustee was required to discharge duties imposed upon fiduciaries under the provisions of the Internal Revenue Code. 503 U.S. at 52.

Second, the trustee's initial adversary complaint for declaratory relief filed on December 27, 1987, did *not* seek the bankruptcy court's determination, under 11 U.S.C. § 505(a), of "(b) the amount of the taxes due." See *Petition No. 99-1643* at 12 ("Upon remand, the Trustee *amended* his adversary complaint . . . to determine the amount and priority of the taxes due the United States.")

Third, the Internal Revenue Service ("IRS") and various courts have followed this Court's ***Holywell*** opinion that 11 U.S.C. § 1141(a) is not binding with respect to postconfirmation claims, 503 U.S. at 58-59, as the controlling authority with respect to the question of whether a bankruptcy court has jurisdiction under 11 U.S.C. § 505(a)

to enter a final judgment, determining the amount of postconfirmation income taxes pursuant to 28 U.S.C. § 2201. See ***In re Hartmann Material Handling Systems, Inc.***, 141 B.R. 802, 810 (Bkrtcy. S.D. N.Y. 1992), quoting ***Holywell***, 503 U.S. at 58 (11 U.S.C. § 105 does not permit a bankruptcy court to determine the amount of postconfirmation tax liabilities); ***In re Hallock***, 154 B.R. 297, 302 (Bkrtcy. S.D. Ariz. 1993), citing ***Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.***, 458 U.S. 50 (1982), ***Granfinanciera, S.A. v. Nordberg***, 492 U.S. 33 (1989), ***United States v. Nordic Village, Inc.***, 112 S.Ct. 1011 (1992), and ***Holywell*** (a bankruptcy court lacks subject matter jurisdiction "under 11 U.S.C. § 505 or another provision of the Bankruptcy Code [unless] it is . . . relate[d] to the bankruptcy estate or to discrete issues concerning whether a particular tax is nondischargeable"); ***Curtis Manufacturing Company, Inc. v. Plastic Clip Corp.***, 888 F.Supp. 1212, 1218 (1994), quoting ***In re Dahlgren, Int'l., Inc.***, 147 B.R. 393, 404 (N.D. Tex. 1992) ("[p]re-confirmation . . . does not encompass a postconfirmation time frame"); ***In re Williams***, 152 B.R. 123, 128 (Bkrtcy. N.D. Tex. 1992) (Liquidating trustee is not a bankruptcy trustee); and also ***In re Lancy***, 208 B.R. 481, 485 (Bkrtcy. D. Ariz. 1997), citing ***Holywell***, held "the [trustee's] duty to pay taxes arose out of events separate and independent of bankruptcy. Taxable income was earned postconfirmation. The trustee had a duty under the Internal Revenue Code to file a return and pay taxes regardless of the bankruptcy, 503 U.S. at 56-59. . . . A bankruptcy court has limited postconfirmation powers. Essentially, the court's continuing jurisdiction is to simply ensure that the plan provisions are met." See ***Smith v. Bank of New York***, 161 B.R. 302, 307 (Bkrtcy. S.D. Fla. 1993) (The plan made no provision for the trustee's payment of postconfirmation income taxes.)

In summary, this Court had jurisdiction in the prior proceedings to reverse the erroneous judgment of the court of appeals that the trustee was not required to file returns and pay income taxes in accordance with the applicable provisions of the Internal Revenue Code. However, in the proceedings remanded for hearings in conformity with this Court's ***Holywell*** opinion, the trustee would have been a defendant and the court of appeals should have vacated its prior opinion and remanded the proceedings to the district court with instructions that the bankruptcy court dismiss the trustee's adversary complaint for want of jurisdiction.

(b) The representation of the respondents' attorney is false that the bankrutpcy court's lack of postconfirmation jurisdiction[4] was not raised in the court of appeals, *No. 99-1642* at 8. The petitioner's initial brief, at 24, argued:

> It is also uncontroverted that the bankruptcy court lacked subject matter jurisdiction to hear the claims in this adversary proceeding, 4 *supra*, quoting ***Northern Pipeline Construction Co. v. Marathon Pipe Line Co.***, 458 U.S. 50, 102 S.Ct. 2850 (1982), and in ***Matter of Lemco Gypsum, Inc.***, 910 F.2d 784 (11th Cir. 1990), this Court reversed a district court's affirmance of a civil contempt fine imposed by a bankruptcy court on the grounds that a bankruptcy court could not exercise jurisdiction over a particular proceeding if 28 U.S.C. § 1334 did not provide jurisdiction to the district court. 910 F.2d at 789.
>
> This proceeding is not a case under title 11, and does not arise in, nor is it related to, a case

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[4] See *Post-Confirmation Jurisdiction In the Bankruptcy Courts: Does It Ever End?*, Kinel and Neier, ***The Business Lawyer***, November 1999, vol. 55, at 81.

> under title 11, because the claims concern post-confirmation events. See 910 F.2d at 788; 11 U.S.C. § 1142 (a bankruptcy court's postconfirmation jurisdiction is limited to the issuance of orders to implement a confirmed plan); also 112 S.Ct. at 1028 (a creditor under title 11 is a person with a preconfirmation claim).

The court of appeals held "this adversary proceeding involves a core proceeding because it involves a matter regarding allowance and estimation of claims involving the trust. See 28 U.S.C. § 157(b)(2). Gould's claim that the bankruptcy court does not have jurisdiction is without merit." App. 13. Thus, the question is whether the opinion of the court of appeals is correct that the bankruptcy court had statutory authority to retain jurisdiction under the provisions of the Bank's plan to enter binding orders concerning the trustee's conduct and the trust's property on the grounds that the bankruptcy court appointed Smith, as trustee of the Miami Center Liquidating Trust, *No. 99-1642* at 9, notwithstanding that (1) the Bank retained sole authority to dismiss the trustee, (2) Smith was not a bankruptcy trustee, or (3) a "trustee in a case under title 11," appointed under 11 U.S.C. § 1104(a), and (4) the bankruptcy court's administration of the estate created under § 541(a) ended as an effect of confirmation, see 502 U.S. at 55 ("The plan . . . 'declared and established' the new Miami Center Liquidating Trust . . . it created a separate and distinct trust").

Marathon, 102 S.Ct. at 2872, n. 26, held, citing ***Williams v. Austrian***, 331 U.S. 642, 658 (1947), that the district court has jurisdiction, and the concurring opinion concluded that "Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises 'the judicial

power of the United States' described by Art. III of the Constitution," 102 S.Ct. at 2881.

2. The Conduct of The Government's Attorneys.

In the prior proceedings before this Court, the Solicitor General argued, citing ***National Muffler Dealers Ass'n v. United States***, 448 U.S. 472, 477 (1979), that

> Congress has delegated to the . . . Commissioner [of Internal Revenue], not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a). ***United States v. Correll***, 389 U.S. at 307 . . . that delegation helps ensure that in "this area of limitless factual variations," ***Ibid***, like cases will be treated alike. It also helps guarantee that the rules will be written by "masters of the subject," ***United States v. Moore***, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect.

The Solicitor General also argued that "Congress has ensured that the duty to report and pay taxes will follow the assets from which income is realized and from which the tax payment is made," ***Petition Of United States For A Writ Of Certiorari***, March 1991 at 10. This Court agreed and held that "the trustee must pay the tax on the income attributable to the corporate debtors' property," 503 U.S. at 52.

The IRS ***Holywell*** Report at 39, issued on July 14, 1992, concluded from the evidence that the Bank's plan was a scheme to avoid the payment of income taxes, which included, *inter alia*,

> (c) One of the provisions of the Plan was the elimination of the claims of Holywell Telecommunications Company and Holywell Leasing Company. As of October 10, 1985, the total amount of rents due thse two nondebtor subsidiaries of Holywell from Miami Center Limited

> Partnership was $3,315,672 plus interest. This was money that could have been used to help satisfy Holywell's tax liability.
>
> (d) The inclusion of the proceeds from the sale of the Washington Properties that included approximately $13,000,000 that belonged to Twin Development Corporation in the "Trust Property." Twin Development was a nondebtor subsidiary of Holywell and was severally liable for the taxes of the consolidated group. . . .
>
> (f) The conveyance of the property of Holywell Telecommunications Company and Holywell Leasing Company to the designee of the Bank of New York without consideration. This further deprived the consolidated group of assets that could have been used to satisfy its tax liability. . . .

The IRS also concluded that "Section 361(c) of the Code provides that no [gain or] loss shall be recognized by a corporation a party to a reorganization on the distribution to its shareholders of property in pursuance of the plan of reorganization," IRS ***Holywell*** Report at 36.[5] Nonetheless, the Government's attorneys negotiated a settlement of income taxes illegally asserted against Holywell, see Petition *No. 99-1643* at 29, and relieved

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[5] In accordance with 26 U.S.C. § 336, prior to August 1, 1986, no gain or loss was recognized to a liquidating corporation on the distribution of property in complete liquidation, and, thus, the dividend distribution of Holywell's property and cash to the trustee of the Miami Center Liquidating Trust did not cause Holywell to incur a tax liability upon the transfer of its property to the trustee. In addition, under 26 U.S.C. § 361(c), prior to August 1, 1986, no gain or loss was recognized by the corporation, if as a party to a liquidating plan of reorganization, it dividended its property and cash to its shareholder pursuant to such plan. See ***General Utilities and Operating Co. v. Helvering***, 296 U.S. 200, 204 (1935) ("the declaration and payment of the dividend resulted in no taxable income.").

Smith of penalties for negligence and personal liability upon his use of the Miami Center Liquidating Trust's funds to pay $10,000,000 for which the IRS asserted Holywell was liable after Holywell had ceased business, had no assets, and no income. See ***Bull v. United States***, 295 U.S. 247, 261 (1935) ("The United States . . . cannot, as against the claim of an innocent party, hold his money. . . . [T]he unjust retention is immoral and amounts in law to a fraud on a taxpayer's rights.").

3. The Liability Of The Bank And Smith For The Damages Caused By Breach Of Trust And Fraud

Although the respondents have conceded that "the federal tax implications of the [Bank's] plan," *No. 99-1643* at 5, was the primary reason for the bankruptcy court's failure to issue a final decree closing the cases in accordance with Bankruptcy Rule 3022, their argument that the trustee's duties under the plain language of the Internal Revenue Code was a "novel question" does not resolve the question of whether a trustee appointed as the fiduciary of a trust created under 11 U.S.C. § 1123(a)(5)(B) must (a) act with undivided loyalty to the trust's beneficiary, and not be guided by the interests of a third person; (b) use reasonable care and skill to preserve the trust property; (c) defend actions which may result in a loss to the trust estate; and (d) not engage in conduct which he knows, or should have known, is illegal, and would be injurious to the trust's beneficiary.

In this case, law and equity requires that the trustee wear a *badge of fraud* for paying money to the Bank after the Bank had indemnified him for his actions under the plan's provisions, and for the failure to seek the bankruptcy court's instructions concerning repayment of the "super-priority" loans, and an IRS ruling concerning the normal administrative procedures for the determination

of the amount of the tax liabilities, see 26 U.S.C. § 6901,[6] prior to the commencement of distribution under the provisions of the Bank's plan.

The final argument of the respondents for the trustee's failure to repay the "super-priority" loans from the proceeds of MCLP's estate based on the erroneous "owned and owed" theory, and that "[e]ven if the loans were repaid from one estate to another . . . then the administrative expenses and creditors would still be repaid before the debtor," *No. 99-1644* at 13, n. 10, is a

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[6] 26 U.S.C. § 6901, ***Transferred assets***, provides, in part:

> (a) **Method of collection.** The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) **Income, estate, and gift taxes.**
>
> A. Transferees. The liability, at law or in equity, of a transferee of property –
>
> (i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),
>
> (ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or
>
> (iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes),
>
> in respect of the tax imposed by subtitle A or B.
>
> B. Fiduciaries. The liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer . . . .

blatant assertion that the trustee's commingled accounting of postconfirmation claims against the liquidating trust with the preconfirmation claims of creditors under title 11 was not actual fraud and that the Bank is not liable as the plan's proponent for the damage to the Miami Center Liquidating Trust and its beneficiary, caused by the trustee's payment of accrued interest, attorneys' fees, fiduciary fees, and accounting expenses, attributable to the plan's wrongful subordination of the valid claims of insiders, see ***In re Holywell Corp.***, 913 F.2d 873, 880 (11th Cir. 1990), and the Bank's failure to disclose its intent that the trustee appointed under the plan's provisions would be relieved of discharging fiduciary duties imposed by law. See 161 B.R. at 307.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petitions, each of the petitions for a writ of certiorari should be granted and consolidated for briefing and oral argument.

Respectfully submitted,

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